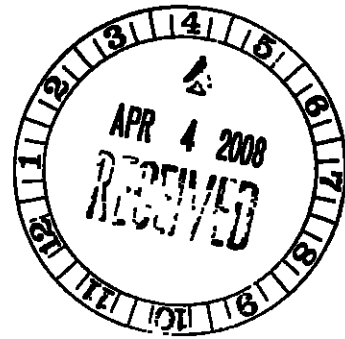


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April 4, 2008

The Honorable Anne K. Quinlan
Acting Secretary
Surface Transportation Board
395 E Street, SW
Washington, D C 20423



RE Docket No NOR 42099, *E I du Pont de Nemours and Company v CSX Transportation, Inc*

Dear Secretary Quinlan

Please find enclosed for filing in the above referenced matter, an original and ten (10) copies of E I du Pont de Nemours and Company's Reply Evidence - **PUBLIC VERSION**. Also enclosed is a compact disk containing written text in pdf format.

An extra copy of this filing is enclosed for stamping and returning to our offices.

If you have any questions, please do not hesitate to contact the undersigned.

Sincerely,

Nicholas J. DiMichael
Jeffrey O. Moreno

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**BEFORE THE
SURFACE TRANSPORTATION BOARD**



E.I. DUPONT DE NEMOURS AND COMPANY)

Complainant,)

v.)

CSX TRANSPORTATION, INC ,)

Defendant)

Docket No. NOR 42099

ORIGINAL

COMPLAINANT'S REBUTTAL EVIDENCE

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April 4, 2008

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- 3) Rebuttal Verified Statement of Amy Nemchik, Logistics Manager, DuPont Glass Laminating Solutions
- 4) Rebuttal Verified Statement of Thomas D. Crowley, President, L E Peabody and Associates, Inc , Alexandria, Virginia

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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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E I DUPONT DE NEMOURS AND COMPANY)	
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Complainant,)	
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v)	Docket No. NOR 42099
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CSX TRANSPORTATION, INC.,)	
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Defendant)	
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COMPLAINANT'S REBUTTAL EVIDENCE

Complainant E.I. du Pont de Nemours and Company ("DuPont") hereby submits its Rebuttal Evidence in response to the Reply Evidence of defendant, CSX Transportation, Inc. ("CSXT"), filed in this proceeding on March 5, 2008. This Rebuttal Evidence consists of three parts. (a) an Argument that summarizes the evidence submitted and discusses the legal standards to be applied in this case, (b) the Reply Verified Statements and accompanying exhibits of (1) Ms. Mary Pileggi, North American Region Logistics Manager, DuPont Logistics, Global Sourcing and Logistics ("Pileggi Reb. V.S."), (2) Mr. Kevin Acker, U.S. Modal Leader for Rail Procurement and Service, DuPont Logistics ("Acker Reb. V.S."), (3) Ms. Amy Nemchik, Logistics Manager, DuPont Glass Laminating Solutions, ("Nemchik Reb. V.S."), and (4) Mr. Thomas D. Crowley, President, L.E. Peabody and Associates ("Crowley Reb. V.S."), and (c) various exhibits from discovery of CSXT in this proceeding.

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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

E I DUPONT DE NEMOURS AND COMPANY)

Complainant,)

v.)

CSX TRANSPORTATION, INC.,)

Defendant)

Docket No. NOR 42099

PART I — ARGUMENT

DuPont has challenged the reasonableness of CSXT's rail transportation rates in this small rate case, and two others, under the Three-Benchmark approach adopted by the Board in *Simplified Standards for Rail Rate Cases*, Ex Parte No 646 (Sub-No 1), decision served September 7, 2007, *petition for reconsideration denied* March 19, 2008 ("*Simplified Standards*"). In this proceeding, DuPont has challenged CSXT's rates for three movements of two different commodities. The first is an outbound movement of synthetic plastic powder, STCC 2821163, from Amthill, VA to Wyandotte, MI ("Amthill Movement"). The second and third are inbound movements of plasticizers, STCC 2818967, from Heyden, NJ to Duart, NC ("Duart Movement") and Washington, WV ("Washington Movement").

As a threshold matter, DuPont has thoroughly established CSXT's market dominance over all three of the movements at issue. For the Duart and Washington Movements, DuPont has shown that, due to contamination concerns, it has never shipped a single truckload of plasticizer over these lanes. For the same reason, transloading is not an option. CSXT's attempt to rebut these contamination concerns with data from its Transflo subsidiary must fail, because CSXT has

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not shown that Transflo has any experience handling plasticizers or that the commodities in its study share contamination issues that are comparable in any way to plasticizers. Furthermore, even if contamination concerns did not exist, DuPont has demonstrated that trucks are substantially more costly than rail. Finally, CSXT's claim that it established the challenged rates based upon DuPont claims of truck competition are belied by the actual chronology of the negotiations between the parties.

For the Amphill Movement, DuPont has shown that, when rail is an option, it ships over 97% of synthetic plastic powder by rail. DuPont Op. Ev. at 16. Although 86% of the Amphill Movement traffic moves via rail, the still small amount handled by truck is only on an expedited basis, because CSXT's loaded transit time averaged 13 days. *Id.* at 17. DuPont also demonstrated that its actual truck costs exceed its rail costs on CSXT by █% even after CSXT imposed a █% rate increase.¹ Furthermore, DuPont has never transloaded this commodity, and even if it did, the transload line-haul rate far exceeds the challenged CSXT rate.

DuPont and CSXT have proposed "final offer" comparison groups that differ in four criteria. However, only two of these criteria are common to all three issue movements and one is unique to the Amphill Movement and another to the Duart and Washington Movements. In the aggregate, the differences show that DuPont has selected the most similar comparison groups to the issue movements.

First, for all three issue movements, DuPont has selected the only admissible distance-based evidence. Although both parties have applied the same criteria for selecting comparable movements based upon distance, only DuPont has applied that criteria to the proper length of haul for the issue movement. DuPont has used the issue movement miles derived from the same

¹ All shaded text contains CONFIDENTIAL and HIGHLY CONFIDENTIAL information that is subject to a protective order in this proceeding.

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source as the Waybill Sample, whereas CSXT has used internal records that cannot be verified by DuPont. Since the Board has prohibited the parties from selecting comparable movements based upon any information other than from the Waybill Sample or a public source, CSXT's miles are *de facto* unreasonable.

Second, for all three issue movements, CSXT has applied a fuel surcharge criteria that overstates the reasonable level of contribution to joint and common costs. CSXT has excluded all movements without an amount in the "Miscellaneous Charges" field of the Waybill Sample on the unproven assumption that fuel costs were not recovered on those movements. But, even if the Board were to accept this assumption as true, the fuel surcharge methodology applied by CSXT from 2002 to 2005 was subsequently declared to be an unreasonable practice because that methodology over-recovered actual changes in fuel costs for individual movements in order to cross-subsidize movements without a fuel surcharge. By restricting its comparison groups to only movements that over-recovered fuel costs, CSXT has artificially inflated the R/VC ratios. In contrast, by not including a fuel surcharge factor in its selection of the comparison groups, DuPont has averaged the effect of CSXT's fuel surcharge over-recovery against CSXT's alleged under-recovery on other movements. Thus, the DuPont comparison groups are eminently more reasonable and similar in the aggregate to the issue movements.

With respect to just the Duart and Washington Movements, CSXT has incorrectly excluded the Duart Movements as issue traffic for the Washington Movement comparison group and vice-versa.

Finally, for the Amphill Movement, CSXT has unduly narrowed the comparable commodities to STCC 28211, whereas DuPont has identified comparable commodities from CSXT Tariff 28211, which includes five additional commodities at the 7-digit STCC level.

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DuPont has taken the more reasonable approach because, by CSXT's own admission in this case, its grouping of commodities in a single tariff in the normal course of business is based upon common characteristics, uses and markets

DuPont has proposed two adjustments to the average R/VC ratios of the comparison groups to account for "other relevant factors " First, DuPont has applied the Board's recently-adopted capital asset pricing methodology ("CAPM") to recalculate the RSAM and R/VC>180 benchmarks for 2002 through 2005, in order to "ensure the availability of accurate cost information in regulatory proceedings " 49 U.S.C. 10101(14) CSXT wrongly asserts that this adjustment would constitute an impermissible retroactive rulemaking But, this would not be a retroactive rulemaking because it does not take away or impair vested rights acquired under existing law Nor does it impact any settled expectations of CSXT in the current RSAM or R/VC>180 Finally, although DuPont did not make adjustments to all of the variables and calculations that would be affected by a switch to CAPM, because the Board has prohibited such adjustments in *Simplified Standards*, the DuPont analysis conservatively understates the reductions to the maximum reasonable rates of making all of those adjustments DuPont has proven this fact by calculating the maximum reasonable rates of the issue movements, if CAPM were actually applied to all the other variables that CSXT has identified.

Second, DuPont has calculated an efficiency-adjusted RSAM in order to account for the Long-Cannon factors in the statute The efficiency-adjusted RSAM eliminates traffic being carried at less than long-run variable cost. Because there no longer is significant excess capacity in the rail industry, there is no reason for CSXT to be transporting commodities at less than this level

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CSXT also has proposed two adjustments for "other relevant factors." First, CSXT claims that there is a flaw in the RSAM methodology that fails to include taxes in the revenue shortfall. DuPont contends that there is no actual shortfall because URCS overstates the tax component of variable costs by using the statutory tax rates, which in turn overstates the revenue shortfall. However, even if the Board accepts CSXT's contention, the proper fix is to apply CSXT's effective tax rate rather than its statutory tax rate. But, given the multitude of countervailing factors that must be considered before declaring the existence of a flaw in the RSAM methodology and determining how to fix such a flaw, this narrow proceeding between just CSXT and DuPont is not the appropriate forum for deciding these issues.

Second, CSXT improperly has adjusted the revenues and costs of every comparison group movement to 2007 "market" levels, before determining the average R/VC ratio of the group. But, this adjustment would undermine the Board's carefully considered decision to use a 4-year average of all three benchmarks in order to smooth out the impact of market fluctuations over time. CSXT's adjustment also is not objective because it fails to show the countervailing effects that its adjustment would have on the RSAM and $R/VC > 180$, which would decrease the expansion ratio applied to the comparison group average R/VC ratio. CSXT also has failed to demonstrate that its adjustment is necessary or appropriate to reflect any change in the market that is not captured by the R/VC ratio. In fact, DuPont demonstrates that no adjustment is necessary.

The maximum R/VC ratios that CSXT advocates in this proceeding are anything but reasonable. Before making its two "other relevant factor" adjustments, the CSXT comparison groups produce maximum R/VC ratios of 357% for the Amphill Movement, 327% for the Duarte Movement, and 328% for the Washington Movement, of which the latter two are below the

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DuPont comparison group maximum R/VC ratios After making its adjustments, however, the CSXT maximum R/VC ratios jump to 454% for the Amphill Movement and 420% for both the Duart and Washington Movements. DuPont Witness Crowley has calculated CSXT's return on equity ("ROE") at these rate levels on a pre- and post-tax basis. Crowley Reb. V S. at 17-18 & Ex TDC-26. The pre-tax ROE for the issue movements are 151.6% (Amphill), 135.3% (Duart), and 137.9% (Washington). These compare to the Board's 2005 pre-tax CAPM weighted average cost-of-capital of 12.9%. The post-tax ROE for the issue movements are 106.8% (Amphill), 95.3% (Duart), and 97.2% (Washington). These compare to the Board's post-tax 2005 CAPM weighted average cost-of-capital of 8.4%. Returns at these levels cannot be reasonable.

DuPont presents this Reply Evidence and Argument in six parts. Part I responds to CSXT's market dominance evidence. Part II addresses the differences between the parties' variable cost calculations for the issue movements. Part III compares and contrasts the differences between the parties' "final offer" comparison groups. Part IV addresses the "other relevant factors" that each party has presented. Part V presents the maximum R/VC ratios for the issue movements based on the DuPont "final offer" comparison groups, as adjusted by its "other relevant factors." Finally, Part VI summarizes the relief that DuPont requests.

I. DUPONT HAS DEMONSTRATED THAT CSXT HAS MARKET DOMINANCE OVER THE ISSUE MOVEMENTS.

DuPont demonstrated in its Opening Evidence that CSXT has market dominance over the three movements at issue in this proceeding. CSXT's Reply Evidence, while long on bluster, hyperbole, and unsupported mischaracterizations of both the Board's case law and the underlying facts, is remarkably bereft of relevant, persuasive evidence that directly addresses the grounds established by DuPont for the Board's jurisdiction over the rates at issue in this case.

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A. CSXT Concedes All Of The Requirements Necessary To Demonstrate Market Dominance Except For Truck-Based Intermodal Competition.

Prior to addressing CSXT's contention that "there is effective truck competition for all three of the movements at issue," and that DuPont thus cannot prove market dominance, it is worth examining what points relevant to market dominance CSXT must and does concede. CSXT Reply Ev at 3 As noted in DuPont's Opening Evidence, "market dominance" requires both a quantitative and a qualitative showing *Market Dominance Determinations and Consideration of Product Competition*, 365 I.C.C. 118, 131-32 (1981) Here, CSXT concedes the quantitative aspect of the market dominance determination, admitting that the revenue-to-variable cost (R/VC) ratio for each of the three issue movements exceeds the jurisdictional threshold of 180% See CSXT Reply Ev at 3 n 4

The qualitative component of the market dominance showing requires DuPont to adduce evidence showing an absence of both intramodal and intermodal competition. *Market Dominance Determinations and Consideration of Product Competition*, 365 I C C at 132 While it does not directly address the issue in its Reply Evidence, CSXT must similarly concede that it faces no intramodal competition for any of the three issue movements because only CSXT serves the two destination points of Duart, NC, and Washington, WV, for the plasticizer movements and because CSXT is the sole railroad servicing the Amphill, VA, origination point for DuPont's synthetic plastics movement to Wyandotte, MI Thus, the only point of contention between the parties with respect to the market dominance determination is the lack of effective intermodal competition from motor carriers for the three issue movements

B. CSXT Applies An Incorrect Legal Standard To The Intermodal Competition Component Of The Market Dominance Determination.

In its Opening Evidence, DuPont demonstrated that CSXT does not face effective intermodal competition for its plasticizer movements originating at Heyden, NJ, or its synthetic

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plastics movements originating at Amphill, VA, by showing that four of the factors identified in *Market Dominance Determinations and Consideration of Product Competition* militate strongly in favor of a finding of market dominance. DuPont Op Ev at 10-14 Before addressing CSXT's attempts to rebut this conclusion, however, CSXT's misstatements of the applicable legal standard must be addressed

In its Reply Evidence, CSXT appears to assert that the mere presence of a truck alternative precludes a finding of market dominance CSXT Reply Ev at 4, *citing Consolidated Papers, Inc v Chicago & North Western Transp Co*, 71 C C 2d 330, 337 (1991). However, the Board has never held that the mere existence of a "competitive factor" conclusively establishes an absence of market dominance Rather, the proper standard for market dominance determinations under the statutory "effective competition" standard of 49 U.S.C. § 10707(a) was more recently reiterated by the Board when it stated that, even though the existence of alternatives to rail carriage may impose an outer limit on the rates a railroad can charge, such alternatives may only impose a loose "competitive constraint" that fails to amount to "effective competition" *FMC Wyoming Corp v Union Pac R R Corp*, 4 S.1 B. 699, 718 (2000)

This summary of the market dominance standard is consistent with the fuller explanation given by the D.C. Circuit over twenty years ago

At the core of the "effective competition" standard is the idea that there are competitive, market pressures on the railroads deterring them from charging monopoly prices for transporting goods
[T]he mere existence of some alternative does not in itself constrain the railroads from charging rates far in excess of the just and reasonable rates that Congress thought the existence of competitive pressures would ensure

Arizona Public Service Co v United States, 742 F.2d 644, 650-51 (D.C. Cir. 1984) (emphasis added), *see also McCarty Farms, et al v Burlington Northern, Inc*, 31 C C 2d 822, 831-32

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(1987) ("The issue . . . is whether McCarty has made its case that the BN lacks *effective* competition. The existence of intermodal competition is not enough to establish a lack of market dominance " (emphasis in original)). Thus, the proper standard for the market dominance determination is not based on the mere existence of some alternative mode of transport, but rather whether the alternative mode *actually* constrains the railroad from charging *unreasonable* rates. For this reason, the standard is not one of mere intermodal competition, but rather of *effective* intermodal competition.

C. CSXT Does Not Face *Effective* Intermodal Competition From Motor Carriers For The Duart and Washington Movements.

In its opening evidence, DuPont demonstrated that CSXT does not face effective intermodal competition from motor carriers for its inbound plasticizer movements because (i) severe contamination concerns preclude carriage of the plasticizer by truck altogether (ii) causing DuPont to have *never* shipped the plasticizer by truck, and (iii) when all of the associated costs of both truck and rail transport are considered, truck transport is significantly more costly than rail. DuPont Op. Ev. at 11-15.

In its Reply Evidence, CSXT raises several points that it contends demonstrate effective intermodal competition from motor carriers for the Duart and Washington Movements. However, none of the points raised by CSXT affect the intermodal competition analysis under the factors enunciated in *Market Dominance Determinations and Consideration of Product Competition*. Indeed, CSXT fails to even reference these factors, instead trying to minimize the DuPont evidence—the collective import of which makes a strong showing of market dominance. Each of the points raised by CSXT falls into one of five categories, which are addressed in turn below.

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1. **Contamination concerns preclude movement of the plasticizer by truck and via transloading.**

In its Opening Evidence, DuPont explained in detail the overriding concern that has underlied its historic refusal to receive plasticizer shipments by truck—the risk of product contamination DuPont Op Ev at 11-12. In response, CSXT set forth detailed statistics related to the transloading operations of Transflo Terminal Services, Inc —a CSXT subsidiary—that are wholly irrelevant to the contamination issue in the case at hand. CSXT Reply Ev at 5 While the Transflo data demonstrate a relatively low reported contamination rate for the "various bulk products (in liquid and dry form)" that Transflo handles, CSXT makes no effort to identify the nature of these bulk products or to describe their inherent susceptibility to contamination *Id* Obviously, a product as impervious to cross-contamination through transloading as a bale of hay or a bundle of lumber is a "bulk product" that may be included in the Transflo statistics. By its nature, such a product is simply not comparable in any manner to the complex and chemically delicate liquid plasticizer that is at issue in this case. If Transflo had any experience transloading liquid plasticizer, presumably CSXT would have said so

Additionally, the Transflo data upon which CSXT relies include only instances of *reported* contamination It is very likely that a far greater number of contamination incidents occurred that were not reported to Transflo, either because the contamination did not affect the product's end use or because the shipper failed to see any utility in reporting the contamination incident to Transflo

It is also highly unlikely that products that are especially susceptible to contamination, like the plasticizer at issue here, would be transloaded in the first place. Rather, there is a strong probability that companies shipping such products, like DuPont, would consciously avoid transloading to minimize unnecessary handling of their product and the attendant increased risk

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of contamination DuPont has done so here to ensure the integrity of its final product, Butacite®, because Butacite® is a key input for products with stringent quality control standards, such as automobile windshields Pileggi Op V S at ¶ 7

For all of the above reasons, CSXT's transload statistics offer no relevant assessment of the true risk of contamination for products such as the plasticizers at issue here. Thus, CSXT has failed to provide any competent evidence that would alter or affect the necessary conclusion that no effective intermodal competition exists because DuPont's stated contamination concerns make shipment of the plasticizer by truck and transloading alternatives infeasible

2. Truck is substantially more costly than rail.

In its Opening Evidence, DuPont also established that, even if the contamination concerns addressed above were not present, truck transport would be significantly more costly to DuPont than rail transport via CSXT. DuPont Op Ev at 12-15

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

In reality, if the overriding contamination concerns were not present, the real truck rates DuPont would confront would not be the rough estimates allegedly calculated by CSXT, but the rates provided by [REDACTED] and set forth in DuPont's Opening Evidence See DuPont Op

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Ev at 13-14 Clearly, if the contamination concerns described above were not an overriding factor and CSXT's calculations predicting significant cost savings were correct, DuPont would not have hesitated to take advantage of the lower-cost truck alternative. The fact that DuPont did not (and *could not*) do so demonstrates the serious concerns about contamination and higher truck costs that DuPont actually faced

In its Reply Evidence, CSXT also speculates that DuPont's cost analysis fails to account for the savings associated with switching to motor carriers for the plasticizer movements, including the elimination of rail car lease and ownership costs, reduced labor costs through the use of truckers to load and unload the product, and reduced inventory costs CSXT Reply Ev at 8 But, to the extent there would be any savings, DuPont has accounted for those in its rail-truck cost comparisons The reality, however, is that DuPont would not realize a net operational cost savings if its plasticizer shipments were made via truck instead of rail Pileggi Reb V S at ¶ 6

Contrary to CSXT's allegations, DuPont has clearly accounted for the savings that would occur through the elimination of railcar lease and ownership costs On page 13 of its Opening Evidence, DuPont added the railcar lease and maintenance costs for each railcar into its total rail cost calculations before comparing total rail and truck costs Further subtracting the railcar lease and ownership costs from the total rail-equivalent truck cost when these expenses have already been added to the total rail cost would double count those costs Thus, DuPont's cost analysis properly accounts for the elimination of railcar lease and ownership costs

CSXT's speculation regarding labor cost savings through the use of truckers to load and unload plasticizer is also nothing more than that—pure speculation DuPont would not rely upon truck drivers to unload plasticizer at its facilities due to the high risk of contamination during the unloading process Pileggi Reb V S at ¶ 4. Instead, DuPont must hire specially trained

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operators to unload plasticizer shipments *Id.* For this reason, as discussed in its Opening Evidence, if DuPont were to switch to truck transport, it would incur higher labor costs in the amount of \$ [REDACTED] at each of the Washington Works and Duart facilities due to the need to handle larger volumes of truck traffic to transport the same volume of plasticizer. *DuPont Op. Ev.* at 14; *Pileggi Op. V.S.* at ¶ 12.

Finally, any inventory cost savings would be *de minimis* at best, and the labor costs associated with the additional unloaders needed to handle the extra truck traffic would more than offset any such savings. *Pileggi Reb. V.S.* at ¶ 6. [REDACTED]

[REDACTED]² This shipment data demonstrates that DuPont carefully manages its plasticizer orders for delivery on an "as needed" basis, meaning that only relatively small amounts of plasticizer sit unused in inventory for a short period of time, even when transported by rail. *Pileggi Reb. V.S.* at ¶ 5. Thus, the marginally lower inventory costs associated with truck shipments of plasticizer would not significantly impact DuPont's cost analysis. *Id.* at ¶ 6. In the end, DuPont would gain no operational cost savings (but would actually incur higher labor costs) if the plasticizer shipments were made by truck instead of rail. *Id.* Thus, CSXT has again failed to provide any evidence to alter the necessary conclusion that no effective intermodal competition exists because transport of plasticizer by truck, even if it were not precluded by contamination concerns, would be prohibitively expensive vis-à-vis rail.

² See 2007 Heyden-Duart and Heyden-Washington Rail Shipment Log (DP-300041565, DP-300041581-300041583), attached as DuPont Reb. Ex. 1, *see also* 2006 Monthly Shipment Metrics (DP-20001-20002), attached as DuPont Reb. Ex. 2.

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3. CSXT did not rely on DuPont's assertions that DuPont could save money by switching to trucks.

In its Reply Evidence, CSXT contends that DuPont represented that it could switch to trucks to lower costs and claims that DuPont has now "reversed field" to assert that trucking is not a feasible alternative CSXT Reply Ev at 4-5. However, as described below, CSXT's alleged reliance on posturing statements made during rate negotiations is not the type of hard evidence needed to demonstrate effective intermodal competition from motor carriers Further, the evidence demonstrates that, in reality, CSXT did not actually give any weight to these statements in setting the rates at issue

CSXT repeatedly emphasizes statements by DuPont representatives that DuPont could lower its transportation costs [REDACTED] by using trucks for the plasticizer movements. However, far from an "express acknowledgment of truck competition" that conclusively "proves that CSXT is not market dominant," CSXT Reply Ev at 6, the Board does not consider such statements to be particularly probative on the issue of market dominance³ The Board has recently held that a rail carrier may not rely on statements made by a shipper's representatives regarding the competitiveness or non-competitiveness of the carrier's proposed rates during rate negotiations as anything more than "posturing in aid of [the shipper's] negotiation position." *FMC Wyoming*, 4 S T B at 717 Because these statements are not the type of hard evidence necessary to demonstrate effective competition, they are irrelevant to the market dominance analysis and not indicative of effective intermodal competition

³ CSXT misrepresents the decision in *Consolidated Papers, Inc v CNW Transportation Co* to mean that the statements made by DuPont during rate negotiations are an "express acknowledgment of truck competition" that supports a finding of effective competition In *Consolidated Papers*, the Interstate Commerce Commission's finding of effective competition was supported not by any statement made by a shipper during rate negotiations, but by an explicit admission in the shipper's *pleadings before the Commission* wherein it "refer[red] to the Michigan rail rates as 'truck competitive'" 7 I C C 2d 330, 338 (1991)

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Further, even if the statements were considered probative, Richard Karn's *post hoc* attempts to rationalize CSXT's rates as competitively calculated in response to DuPont's assertions clash resoundingly with the facts of the DuPont-CSXT rate negotiations [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] the CSXT tariff rates that are the subject of this proceeding, including the two rates for the plasticizer moves at issue here, were first proposed by CSXI on March 9, 2007, some three months *before* that meeting. *Pileggi Reb V S* at ¶ 2. Furthermore, the rates at issue went into effect on June 16, 2007, only eight days after the June 7 meeting. *Id* at ¶ 3, *compare* DuPont Reb Ex 3 [REDACTED]

[REDACTED]

[REDACTED] with DuPont Reb Ex 4 [REDACTED]

[REDACTED]

[REDACTED] Thus, CSXT's failure to adjust its proposed rates for the Washington and Duarte Movements following the June 7 meeting demonstrates that, in

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reality, CSXT did not set its rates based upon any DuPont claim that motor carriers pose a viable competitive alternative for the issue movements⁴

The additional assertions relied upon by CSXT to support its claim of effective intermodal competition also fall short when compared to the actual facts of the parties' rate negotiations. For example, CSXT asserts that DuPont represented that a switch to trucks would save DuPont labor costs for plant personnel dedicated to rail car loading and unloading. CSXT Reply Ev. at 5. However, DuPont never made such statements as to the plasticizer movements. Pileggi Reb. V.S. at ¶ 4. [REDACTED]

[REDACTED] As noted above, in reality, DuPont's labor costs would actually *increase* by \$[REDACTED] annually at each plant in the event that plasticizer were to be shipped by truck.

Similarly, CSXT asserts that DuPont "has publicly claimed that shifting to truck transportation would eliminate expenses for its use of emergency truck shipments at premium market rates, which DuPont claimed was necessary because of inconsistent rail service." CSXT Reply Ev. at 4-5. This statement is ludicrous in light of DuPont's evidence in this case that no plasticizer has ever been shipped by truck to DuPont, emergency or otherwise. See Pileggi Op. Ev. V.S. at ¶ 8. CSXT is simply pulling generic statements out of the air that, if made at all,

⁴ In December 2007, six months after initially publishing the challenged rates and four months after DuPont filed its Complaint, CSXT reduced the line-haul rates to \$5397 and \$5224 plus a fuel surcharge for the DuPont and Washington Movements, respectively.

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were in the context of *other* movements of *other* commodities, and then applies them to the issue movements without any regard for the facts of those movements.⁵

CSXT also relies heavily on an internal DuPont email from Amy Bonnett Nemchik, a DuPont employee, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Because

Ms Nemchik was unaware of the restrictions on plasticizer transport via truck, her lower cost calculations were incorporated into the presentation made by DuPont on June 7, 2007, part of which indicated a truck savings opportunity [REDACTED] *Id* at ¶ 3; *see also* CSXT Reply Ev at Ex 7 (DuPont Performance Materials Review PowerPoint Presentation)

Finally, CSXT also relies on Ms Nemchik's email for the conclusion that "DuPont stated that switching to trucks would reduce inventory costs because of 'just-in-time' truck delivery." CSXT Reply Ev at 4 However, as is clear from the email chain, Ms. Nemchik's observations were simply "preliminary" in nature and were made before she became aware of the practical impossibility of transporting plasticizer via bulk truck due to contamination concerns CSXT Reply Ev at Ex 7, Nemchik Reb V S at ¶¶ 2, 4

Upon completing her investigation of trucking alternatives, including discussions with the Butacite® Area Manager, Ms Nemchik concluded that contamination concerns precluded a

⁵ [REDACTED]
[REDACTED]

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switch to motor carriage of the plasticizer movements. *Nemchik Reb V S* at ¶ 4 Thus, DuPont had no alternative to CSXT's unreasonable rail rates *Id*, *Pileggi V S.* at 3.

As demonstrated above, the statements made by DuPont during the rate negotiation process are not probative on the issue of market dominance, but are more properly considered "posturing" that is inherent in the negotiation process Further, the evidence is clear that, to the extent the statements on which CSXT claims it relies were made, the statements did not relate specifically to the plasticizer movements at issue here, but more generally to *other* DuPont products and movements. Finally, to the extent CSXT alleges it reduced its rates to competitive levels in reliance on DuPont's claims to have found a competitive alternative, the actual course of the negotiations and effective dates of CSXT's tariffs belie those claims entirely

4. **DuPont has no economically viable transload alternative for the plasticizer movements.**

In footnote 6 of its Reply Evidence, CSXT contends that both the Heyden-Washington and Heyden-Duart plasticizer movements have viable transloading alternatives on Norfolk Southern ("NS") [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

As noted above and in DuPont's Opening Evidence, transloading is not a viable option given the strong contamination concerns associated with the transport of plasticizer However, even if the contamination concerns were not present, transloading still would not be a viable option [REDACTED]

[REDACTED]

5. **"Geographic competition" is irrelevant to the effective competition analysis, and even if geographic competition were relevant, it does not exist here.**

However, in *Market Dominance Determinations—Product and Geographic Competition*, the Board concluded that it "will no longer consider evidence of geographic competition in market dominance determinations." 3 S.T.B. 937, 950 (1998). As part of its analysis, the Board

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noted that geographic competition arguments "have required us to address complex non-transportation issues . requir[ing] us to 'second-guess' shipper management . [and] delve deeply into industrial operations that are far removed from the transportation industries that we regulate " *Id* at 947 Because, with all due respect, neither CSXT nor the Board is the proper authority to exercise DuPont's business judgment regarding the location and quantity of the production of its products, the Board's rationale for excluding geographic competition from its analysis is fully applicable here. For this reason, and because of the Board's explicit decision to exclude geographic competition from its market dominance analysis, CSXT's recourse to alleged "geographic competition" is irrelevant.

Further, even if geographic competition were still a relevant element in the effective competition analysis, DuPont's idling of Butacite® production at its Washington facility and its continued production of Butacite® at its Duart facility is not evidence of "geographic competition " Geographic competition requires that the complaining shipper be able to "avoid using the defendant railroad by obtaining the product from a different source or by shipping the same product to a different destination " *Id* at 937 Here, however, since both the Washington Works facility and the Duart facility are solely served by CSXT, DuPont has no opportunity to "avoid using" CSXT for its plasticizer shipments. Thus, no geographic competition exists here

D. CSXT Does Not Face *Effective* Intermodal Competition From Motor Carriers For The Amphill Movement.

In its opening evidence, DuPont demonstrated that CSXT does not face effective intermodal competition from motor carriers for its outbound synthetic plastic powder movements from Amphill, VA, to a customer's facility in Wyandotte, MI, because (1) over ■ percent of the volume on the route was transported by CSXT in 2006, (11) DuPont only used bulk truck shipments when its customer required expedited shipments in a shorter time than CSXT was able

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to provide; (iii) when all of the associated costs are taken into account, the truck rates are substantially higher than CSXT's rail rates, and (iv) the physical characteristics of synthetic plastic powder—including its low melting point—would require DuPont to incur additional costs for higher volumes of bulk truck shipments. DuPont Op Evid at 15-19

In its Reply Evidence, CSXT argues that it faces effective intermodal competition from motor carriers for the Amphill Movement. In the end, however, none of the points raised by CSXT affect the appropriate intermodal competition analysis under the factors enunciated in *Market Dominance Determinations and Consideration of Product Competition*. Additionally, as described in greater detail below, CSXT again fails to account for the collective import of these factors and the fact that they conclusively demonstrate CSXT's market dominance

1. **The cost differential between rail and truck transportation demonstrates that CSXT faces no effective intermodal competition for the Amphill Movement.**

CSXT contends that it faces effective intermodal competition because the rail-equivalent line haul charge imposed by [REDACTED] is only [REDACTED] percent higher than CSXT's linehaul rate of \$6,272. CSXT Reply Ev at 8. As established in DuPont's Opening Evidence, however, a mere comparison of line haul charges fails to adequately account for all of the costs DuPont is forced to incur each time it must ship to Wyandotte by truck. Rather, when all of the attendant shipping costs are included, DuPont's cost of shipping by truck is [REDACTED] percent higher than the cost of shipping the same volume by rail.⁶ DuPont Op. Ev. at 18

[REDACTED]

[REDACTED]

⁶ While CSXT claims that DuPont's cost calculations "do not acknowledge, let alone quantify, the additional cost savings" associated with a switch from truck to rail service, CSXT Reply Ev at 9, n 10, in fact, as already described in the plasticizer discussion above, DuPont has fully accounted for the elimination of rail car ownership and lease costs in its per railcar truck cost calculations, any other method would "double count" those costs. See DuPont Op Ev at 17-18

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CSXT then argues that this "small differential" between CSXT's tariff rate and the resulting truck transport rate "is not sufficient to demonstrate that the truck alternative is infeasible." *Id.* at 10. What CSXT overlooks, however, is the practical impossibility of shifting sufficient volumes of synthetic plastic powder to truck transport to obtain a sufficiently low linehaul rate.

In addition to product contamination concerns, other practical concerns that CSXT fails to address also limit DuPont's ability to shift large quantities of synthetic plastic powder to bulk truck. One such consideration is the limited availability of the temperature-controlled bulk pneumatic trailers necessary to transport the powder. DuPont Op. Ev. at 19. Additionally, the Board has long recognized the importance of customer and supplier preference for rail in making intermodal competition determinations. *See, e.g., Dayton Power & Light Co. v. Louisville & Nashville R.R. Co.*, 11 I.C.C.2d 375, 382-83 (1985) (finding no effective intermodal competition where supplier preferences, as referenced in coal supply agreements, were for delivery only via rail). Here, the preference of DuPont's Wyandotte customer to receive the powder by rail also prevents DuPont from seriously considering truck shipments on anything more than an emergency basis. *Pileggi Reb. V.S.* at ¶ 11.

Far from exercising restraint in the face of effective competition from motor carriers, CSXT's █ percent rate increase for the Amphill Movement, to a rate within █ percent of █ rate, simply "matches prices set by alternatives with significantly higher costs, while maintaining a dominant market share"—an action that fails to demonstrate effective intermodal competition. *FMC Wyoming*, 4 S.T.B. at 718. █

[REDACTED]

[REDACTED] "7 For these reasons, CSXT's rate increase and the large cost differential vis-à-vis motor carriage clearly demonstrate that CSXT faces no effective intermodal competition for the Amphill Movement

2. **The small overall proportion of truck shipments to Wyandotte does not reflect effective intermodal competition.**

CSXT claims that "[s]o long as *some volume* [of traffic] can be diverted and impose competitive constraints on CSXT's pricing, the Board should find effective competition exists." CSXT Reply Ev at 11 (emphasis added) While it is true that motor carriers need not be capable of handling substantially all or even a majority of the subject traffic for effective competition to exist, *Aluminum Ass'n, Inc v Akron, Canton & Youngstown R R Co*, 367 I.C.C. 475, 483 (1983), it is equally *untrue* that evidence of merely "some volume" of traffic on an alternative mode suffices to establish effective competition Rather, as the Commission noted in *Aluminum Association*, "considerable competitive pressures" must result from a handling of a "meaningful portion" or a "substantial portion" of the total volume for effective intermodal competition to exist *Id* at 483-84 Further, while potential competition is relevant, "the potential [must be] sufficiently realistic to effectively constrain the rail rates " *Dayton Power & Light*, 11 I C C 2d at 383

⁷ See DuPont Reb Ex 7 (CSX-ALLHC-000326) and Ex 8 (CSX-000904)

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Here, customer preference, the threat of traffic congestion at the customer's facility,⁸ the real probability of costly detention and demurrage charges, a lack of sufficient temperature-controlled pneumatic trailers, and the possibility of contamination all combine to make the potential for regular, large-volume movements by truck unrealistic. In its Reply Evidence, CSXT fails to even recognize, let alone attempt to rebut, the crucial point that all of the limited truck traffic to Wyandotte has been of an emergency or expedited nature, and thus is not indicative of effective intermodal competition. See DuPont Op. Ev. at 16-17. While CSXT acknowledges DuPont's storage capacity and detention and demurrage charge concerns, it does not address these points at all in its Reply Evidence, or account for them in its rail-truck cost comparison. See CSXT Reply Ev. at 11. Thus, the evidence clearly demonstrates that the limited overall volume of truck traffic to Wyandotte under emergency circumstances is not indicative of effective intermodal competition.

3. DuPont has no viable transload alternative available to it on the Norfolk Southern.

As in its discussion of intermodal competition for the plasticizer movements, CSXT also contends that a competitive transload option is available for the synthetic plastic powder movement from Amthill to Wyandotte [REDACTED]

⁸ With respect to the issue of truck congestion at the DuPont customer's facility, CSXT's reliance on the *FMC Wyoming* decision for the principle that an increase of truck traffic to 15 trucks per day was "insignificant" is misplaced and inappropriate. See CSXT Reply Ev. at 10-11. As with any case, the Board must examine the circumstances of the particular parties. *FMC Wyoming* involved the movement of 115,000 to 120,000 tons of coke annually from mining sites to a phosphorous processing plant—production on a vastly larger scale than that involving the movements at issue here. 4 S.T.B. at 712-14 [REDACTED]

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[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Furthermore, Norfolk Southern's public tariff rate on the Petersburg-to-Wyandotte portion of the transload movement is \$9326 per railcar. See Pileggi Reb. V.S. at ¶ 9; see also DuPont Reb. Ex. 9 (NS Tariff). This tariff rate is some \$3000 more than CSXT's rate for the entire Amphill Movement and clearly shows that a transload alternative on NS is not economically feasible.

4. **The physical nature of the synthetic plastic powder requires DuPont to incur additional costs for bulk trucking.**

In response to DuPont's stated concerns about contamination of its synthetic plastic powder, CSXT again relies on the Transflo contamination data discussed above to contend that only a *de minimis* risk of contamination is presented by motor carrier transport or transloading. CSXT Reply Ev. at 11. However, for the same reasons discussed with respect to the plasticizer movements, the Transflo data is largely irrelevant to the synthetic plastic powder movements at issue here. Again, it is not clear that the "bulk products" studied are comparable to DuPont's synthetic plastic powder and, indeed, it is less likely that the producers of such contamination-prone products would allow their products to be transloaded in the first place. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Further, CSXT's Reply Evidence wholly fails to address DuPont's stated concerns that the physical properties of the synthetic plastic powder cause DuPont to incur additional handling and equipment costs whenever the product is shipped by truck, as the product has a very low melting

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point of less than 100 degrees Fahrenheit While it noted DuPont's argument on the point, CSXT failed to address the fact that the special temperature-controlled bulk pneumatic trailers required to handle the synthetic plastic powder would not be available in sufficient quantities to make a considerable impact on the amount of the powder that is transported by CSXT Thus, CSXT has failed to present any evidence that alters the conclusion that the physical nature of DuPont's synthetic plastic powder necessitates that the product move by rail whenever possible and that, as a result, CSXT does not face effective intermodal competition from bulk trucks

5. **"Geographic competition" is irrelevant to the effective competition analysis and, even if geographic competition were relevant, it does not exist here.**

In its Reply Evidence, CSXT argues in passing that, because the DuPont customer at Wyandotte is also served by NS, "DuPont could source the issue commodity from another location served by NS " CSXT Reply Ev at 10, n.11 As with CSXT's similar allegations with respect to the plasticizer movements, its bald assertion of geographic competition here is irrelevant to the market dominance analysis As noted above, the Board has squarely held that it "will no longer consider evidence of geographic competition in market dominance determinations." *Market Dominance Determinations—Product and Geographic Competition*, 3 S T B at 950.

Further, as a purely factual matter, CSXT's claim perfectly illustrates exactly why the Board eliminated factors such as geographic competition from the market dominance analysis The synthetic plastic powder transported on the Amphill Movement is a trademarked DuPont product called Zytel® that is only produced at two facilities in the entire United States—Amphill and DuPont's Washington Works facility in West Virginia Pileggi Reb. V S at ¶ 10 Further, all of the Zytel® DuPont produces at its Washington Works facility remains at that facility for DuPont's internal consumption in the manufacture of other materials *Id.* Thus,

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DuPont lacks the capacity to produce Zytel® at an alternative facility and should not be subject to the directions of a transportation provider or regulatory agency in making its business decisions as to how best to allocate its corporate resources

Further, even if DuPont could ship Zytel® from the Washington Works facility to Wyandotte, this fact would not be indicative of "geographic competition." Rather, as discussed with respect to the plasticizer movements, above, DuPont's Washington Works facility, like that at Amptill, is solely served by CSXT, meaning that DuPont could not avoid using CSXT by supplying Zytel® wholly via another rail carrier from Washington Works. For these reasons, CSXT's geographic competition argument as to the synthetic plastic powder movement fails.

II. CSXT HAS NOT FOLLOWED THE BOARD-MANDATED PROCEDURES FOR CALCULATING VARIABLE COSTS.

As DuPont explained on page 14 of its Reply Evidence, CSXT has not followed the Board's prescribed procedures for calculating the variable cost of the issue movements. The proper calculation of variable cost is important because the maximum reasonable rate is the product of the adjusted average R/VC ratio for the comparison group multiplied by the variable cost of the issue movement.

The loaded mileage inputs for calculating the URCS variable costs of movements in the Waybill Sample are generated from the PC*Miler|Rail program. Crowley Reply V S at 5-6. Therefore, DuPont has used the same source to identify the loaded miles for the issue movements. In contrast, CSXT has used loaded miles from its internal records for the issue movements, which accounts for the entire difference in the parties' variable cost calculations.

But, it would be inconsistent to use CSXT's internal records for the issue movements while continuing to rely upon the PC*Miler|Rail program for all of the comparison movements. Indeed, all three of the small case benchmarks are calculated from the Waybill Sample, including

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the loaded miles generated from the PC*Miler|Rail program.⁹ Therefore, the maximum R/VC ratios generated by those benchmarks should be applied to variable costs based upon the same data source.

III. THE DUPONT "FINAL OFFER" COMPARISON GROUPS ARE THE MOST SIMILAR TO THE ISSUE MOVEMENTS.

The "final offer" comparison groups presented by DuPont and CSXT for the issue movements are distinguished by just four factors, three that apply to the Amphill Movement and three that apply to the Duart and Washington Movements. Of the four factors, two are common to all three issue movements, one is unique to the Amphill Movement, and one is common to just the Duart and Washington Movements. DuPont Witness Crowley has compared the movements in each party's "final offer" comparison groups and identified the reasons why each has excluded certain movements that the other has included. Crowley Reb. V.S. at 5-7, Exs TDC-21, 22 & 23. In the discussion below, DuPont first addresses the two factors in common to all three issue movements and then discusses the two individual factors. DuPont believes that its "final offer" comparison groups are the "most similar in the aggregate to the issue movements." *Simplified Standards* at 18.

A. CSXT's Fuel Surcharge Criteria Is Based Upon A Methodology That The Board Declared To Be An Unreasonable Practice.

For all three of the issue movements, CSXT unreasonably assumes that all movements with no amount in the "Miscellaneous Charges" field of the Waybill Sample should be excluded from the comparison groups because they did not recover their fuel costs. DuPont has challenged that assumption because CSXT has not demonstrated that it records all fuel

⁹ See Part III B, *infra*, for a more detailed discussion of the role of the PC*Miler|Rail program to select movements of comparable distances.

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surcharges in the "Miscellaneous Charges" field and because there are means other than fuel surcharges to recover fuel costs DuPont Reply Ev. at 21-22.

However, one factor rises above all others to rebut CSXT's position. By its own admission, from 2002-2005, CSXT was over-recovering fuel costs on traffic that was subject to a fuel surcharge as a means to recover its overall fuel expenses, effectively cross-subsidizing traffic that was not subject to a fuel surcharge See DuPont Reply Ev. at 22-23 The Board rejected that fuel surcharge methodology as an unreasonable practice because "there is no real correlation between the rate increase and the increase in fuel costs for that particular movement to which the surcharge is applied " *Rail Fuel Surcharges*, STB Ex Parte No 661, slip op at 7 (served Jan 26, 2007).

Based upon the Board's holding, movements with a fuel surcharge (assuming that is what the "Miscellaneous Charge" field represents) should be excluded from the comparison groups because they would overstate the maximum reasonable R/VC ratio However, if the Board were to exclude movements with a fuel surcharge for overstating cost recovery, and exclude movements without a fuel surcharge for understating cost recovery, there would be no movements left from which to select the comparison groups.

A reasonable approach is to include movements in the comparison group, without any regard to the "Miscellaneous Charges" field. This would permit CSXT's conceded over-recovery of fuel costs for the one category of movements to offset its alleged under-recovery on the other The average R/VC ratio of the combined categories would be most similar to what it would have been if CSXT had properly accounted for fuel in both categories of movements in the first place Because the DuPont comparison groups do this and CSXT's do not, DuPont has taken a reasonable approach, whereas CSXT has not.

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B. DuPont Has Used the Only Source for Length of Haul Permitted by Simplified Standards.

For all three issue movements, CSXT has adopted the DuPont distance criteria for selecting comparison movements, but with two exceptions, one of which violates *Simplified Standards*. DuPont rounded the issue movement miles, as provided in the Waybill Sample by the PC*Miler|Rail program, to the nearest 50 miles and selected movements that fell within a range of 150 miles on either side of that number. Although CSXT has accepted the +/-150 mile range applied by DuPont, it has applied that range to the loaded miles in its internal records rather than the loaded miles in the Waybill Sample. In addition, CSXT has not rounded the issue movement miles from its internal records.

The fatal flaw in CSXT's approach is its use of loaded miles from its internal records. In *Simplified Standards* at page 83, the Board clearly and unequivocally stated that it "will select the comparison group based on information contained in the Waybill Sample released to the parties at the outset of the case and other publicly available information." The miles used by CSXT for the issue movements are not from the Waybill Sample or publicly available information, and therefore cannot be used to identify comparable movements. Thus, DuPont has applied the 150-mile range adopted by both parties to the issue movement miles obtained from the only permissible source.

In addition to being legally improper, it is analytically improper to use CSXT's internal records to calculate the distance of the issue movements while relying upon the Waybill Sample for the distance of the comparable movements. In order to make appropriate comparisons, the distances of the issue movements and the comparison movements should be drawn from the same data source, the PC*Miler|Rail program, which applies the same methodology to calculate the loaded miles for all movements in the Waybill Sample.

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Lastly, CSXT has not adopted the convenient rounding technique employed by DuPont. Although CSXT attempts to portray this as creating a huge discrepancy, the reality is much different. DuPont Witness Crowley has calculated the impact upon the DuPont "final offer" comparison groups of rounding the issue movement miles to the nearest 50 miles versus not rounding at all. See Crowley Reb V S at 12 & Ex. TDC-24. The revised comparison group for the Amphill Movement causes a change in the maximum R/VC ratio from 328% to 335%, an increase of only 1.5%. The revised comparison groups for both the Duart and Washington Movements cause a change in the maximum R/VC ratios from 331% to 332%, an increase of only 0.3%. Thus, the fact that DuPont rounded the issue miles for convenience does not detract from the reasonableness of its comparison groups.

C. DuPont has Selected the Most Comparable Traffic for the Duart and Washington Movements.

In its "final offer" comparison group, DuPont accepted CSXT's criteria for the selection of comparable movements from the commodities covered by CSXT's Tariff 28003, and DuPont accepted CSXT's criteria for identifying the issue movements for exclusion from each comparison group. However, DuPont rejected CSXT's actual identification of the issue traffic because CSXT incorrectly treated the Duart Movement as issue traffic for the Washington Movement and vice-versa. DuPont Reply Ev at 17-18. CSXT has perpetuated this error in its "final offer" comparison groups for the Duart and Washington Movements.

D. DuPont has Selected the Most Comparable Traffic for the Amphill Movement.

In its "final offer" comparison group for the Amphill Movement, DuPont substantially narrowed its criteria for identifying comparable commodities to closely match CSXT's criteria. DuPont Reply Ev at 17. However, where CSXT has used the 5-digit STCC 28211, DuPont has used the commodities in CSXT Tariff 28211. In addition to including STCC 28211, the tariff

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includes five other commodities at the 7-digit level.¹⁰ CSXT's decision to price these commodities similarly is indicative of common transportation characteristics, markets and demand elasticity

In selecting Tariff 28211 for the identification of comparable commodities, DuPont has adopted CSXT's own reasoning when it selected comparable commodities for the Duart and Washington Movements based on Tariff 28003.

CSXT includes these commodities in the same tariff, in its normal course of business, because of their common characteristics, uses, and markets. The significance of the fact that CSXT uses this categorization in its normal course of business is that in that context there is no incentive or reason to create a category in order to obtain a litigation advantage. Because of the similarity of the commodities contained in CSXT-28003, demonstrated in CSXT's grouping them in a single tariff for business reasons, CSXT used those commodities as a specific comparability factor

CSXT Reply Ev at 20-21. Because of the similarity of the commodities contained in CSXT Tariff 28211, demonstrated in CSXT's grouping them in a single tariff for business, DuPont has used those commodities as a specific comparability factor for the Amphill Movement

E. DuPont has Selected the Most Reasonable Comparison Groups.

The Board will select the comparison group that it determines "is most similar in the aggregate to the issue movements." *Simplified Standards* at 18. "The selection of the best comparison group will be governed by which group the Board concludes provides the best evidence as to the reasonable level of contribution to joint and common costs for the issue movement." *Id.* In the aggregate, DuPont has submitted the most reasonable comparison groups for the issue movements

¹⁰ These other STCCs are 2815130, 2818066, 2818606, 2818662 and 2821221

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For the Amthill Movement, DuPont has consistently applied CSXT's own reasoning to select a slightly broader group of comparable commodities than CSXT has selected for this Movement. That reasoning is more comprehensive than CSXT's use of the 5-digit STCC, because it considers a broader array of comparison factors, such as markets and demand elasticity.

For the Duart and Washington Movements, CSXT has incorrectly identified the issue movements for exclusion from its comparison groups. Therefore, the DuPont comparison groups are more reasonable.

For all three issue movements, the parties have applied the same distance criteria of +/-150 miles around the issue movement miles. However, because CSXT has used a prohibited data source for the issue movement miles, its application of the distance criteria is *de facto* unreasonable.

Finally, but perhaps most importantly, CSXT has unreasonably applied a fuel surcharge criteria to all three issue movements. CSXT has excluded all movements without an amount in the "Miscellaneous Charge" field of the Waybill Sample on the unproven assumption that fuel costs were not recovered on those movements. Moreover, even if the Board accepts this assumption as true, CSXT's comparison groups consist of only movements to which CSXT applied a fuel surcharge methodology that the Board has determined to be an unreasonable practice, because that methodology over-recovers actual changes in fuel costs for individual movements. Consequently, CSXT's comparison groups overstate "the reasonable level of contribution to joint and common costs." *Id.*

In summary, DuPont has selected the most reasonable comparison groups in the aggregate, based upon the differences between the "final offer" comparison groups selected by

each party. Since these are the only differences between the parties' comparison groups, DuPont clearly has selected the most reasonable groups that are similar in the aggregate to the issue movements.

IV. "OTHER RELEVANT FACTORS"

Both CSXT and DuPont have proposed two adjustments each to the maximum reasonable R/VC ratios of their comparison groups to account for "other relevant factors."¹¹ DuPont has recalculated the RSAM and R/VC>180 benchmarks to reflect the Board's newly-adopted cost-of-capital methodology for all four years of the Waybill Sample, and it has calculated an efficiency-adjusted RSAM. CSXT has adjusted the RSAM for an alleged need to account for taxes in the revenue-shortfall, and it claims that it is necessary to index the costs and revenues of its comparison group to 2007 levels. CSXT's adjustments are inappropriate, unnecessary, and inherently biased. In contrast, the DuPont adjustments are reasonably and objectively tailored to reflect the Board's most current and precise cost-of-capital methodology and to eliminate inefficient pricing from CSXT's RSAM benchmark.

A. DuPont Has Offered A Reasonable, Objective And Transparent Means To Apply The CAPM Methodology.

In its Opening Evidence at 28-30, DuPont adjusted the Board's RSAM and R/VC>180 figures by calculating the cost of capital underlying those benchmarks in accordance with the Capital Asset Pricing Model ("CAPM") weighted average cost of capital ("WACC") methodology adopted in *Methodology to be Employed in Determining the Railroad Industry's Cost of Capital*, STB Ex Parte No. 558 (Sub-No. 10), slip op. at 1, (served Jan. 17, 2008) ("*Changed Cost of Capital Methodology*"), which the Board described as employing "more current and precise techniques." Because Congress has directed the Board to "ensure the

¹¹ Although CSXT does not describe its adjustments as "other relevant factors," the DuPont critique remains the same.

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availability of accurate cost information in regulatory proceedings," 49 U.S.C. 10101(14), DuPont argued that the Board is legally obligated to make these adjustments. In the alternative, DuPont argued that the Board should make these adjustments as part of its consideration of "other relevant factors." DuPont Op. Ev. at 31.

1. **The Board is legally required to recalculate the RSAM and R/VC > 180 benchmarks using the CAPM methodology.**

CSXT inappropriately relies upon *Edison Elec. Institute v. ICC*, 969 F.2d 1221 (D.C. Cir. 1992) ("*EEI*"), and *Alabama Power Co. v. ICC*, 852 F.2d 1361 (D.C. Cir. 1988) ("*Alabama Power*"), to claim that the Board is not legally obligated to use the CAPM WACC methodology to recalculate the RSAM and R/VC > 180 benchmarks. CSXT Rep. Ev. at 38-39. Neither decision stands for the blanket proposition that the Board is never required to apply a new methodology retroactively. Rather, in both decisions, the Court affirmed ICC decisions not to apply changes to the RCAF retroactively because the ICC had reasonably interpreted the statute in light of the facts before it. Both decisions and their facts are distinguishable from this case.

In *EEI*, the Court affirmed the ICC's decision not to apply the newly-adopted RCAF-A retroactively based upon the concerns cited by the agency:

In deciding not to restate the RCAF, the ICC cited four concerns (1) a railroad might be made "financially liable for rate actions that were protected when they were taken", (2) data limitations make it difficult to calculate accurately productivity gains made prior to 1986, (3) there is a lack of evidence that present rates are unreasonably high, and (4) restatement would have an "unknowable but potentially substantial" impact upon railroads' earnings. *Productivity Adjustment*, 5 I.C.C. 2d at 470-71.

EEI at 1227-28. The Court held that it was reasonable for the ICC "to preserve settled expectations" expressed in the first concern, and to avoid the speculation required by the second concern. *Id.* at 1228. Because those reasons were sufficient to affirm the agency, the Court did not address the other two concerns. *Id.*

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None of those concerns are present in this case. First, CSXT has not expressed any settled expectations in the current RSAM or R/VC>180, nor could it since they were first published only three months ago. Second, there are no data limitations to revising the RSAM or R/VC>180 to reflect the CAPM WACC methodology. *Crowley Reb. V S.* at 19. Third, the precise issue in this case is whether CSXT's current rates are unreasonably high, and accurate RSAM and R/VC >180 benchmarks are essential to making that determination. By contrast, in *EEL*, the ICC's concern was with the effect of applying the RCAF-A to past rates. Finally, restatement of the RSAM and R/VC >180 will not have the substantial impact upon railroad earnings that concerned the Board in *EEL* precisely because these restatements will not affect past rates.

In *Alabama Power*, 852 F.2d at 1370-72, the Court affirmed the ICC's decision not to make a full retroactive adjustment to the RCAF index to correct a forecast error that dated back to the inception of the RCAF. Although the Court observed that the Petitioners' argument for retroactive adjustment had "some force," *id.* at 1371, it ultimately affirmed the agency because it had engaged in a reasonable balancing of the equities by concluding that the harm to railroads outweighed the harm to shippers. *Id.* In this case, however, the equities clearly favor DuPont because the Board's more precise CAPM WACC methodology protects DuPont from paying unreasonably high rates that otherwise would be considered reasonable under the former, and less precise, cost of capital methodology that the Board itself acknowledged has "fallen into disfavor." *Changed Cost of Capital Methodology*, at 5. In contrast, CSXT has no settled expectations based upon the current RSAM and R/VC>180 calculations.

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2. **The Board is permitted to adjust prior year RSAM and R/VC>180 figures by CAPM.**

CSXT incorrectly claims that use of the CAPM WACC methodology to recalculate past RSAM and R/VC>180 figures would be an impermissible retroactive application of a new rule. CSXT Reply Ev at 39, citing *Bowen v Georgetown Univ Hosp*, 488 U S 204, 207 (1988). The retroactive rulemaking referred to in *Bowen*, however, concerned the application of a new rule to vested rights under the previous state of the law. *Id.* (the court rejected an attempt to apply a new rule retroactively to recoup monies paid out under the old rule). In contrast, CSXT has no vested rights based upon either the prior RSAM or cost-of-capital calculations. The D C Circuit has distinguished *Bowen* on this very basis, holding that "[a] law is 'retroactive' if it 'takes away or impairs vested rights acquired under existing law, or creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions or considerations already past'" *Assoc. of Accredited Cosmetology Schools v Alexander*, 979 F. 2d 859, 864 (D C Cir. 1992), quoting *Neild v Dist. of Columbia*, 110 F. 2d 246, 254 (D C Cir. 1940). Because none of these things result from using the CAPM WACC methodology to recalculate past RSAM and R/VC>180 benchmarks, such action would not constitute retroactive rulemaking.

Furthermore, what CSXT claims the Board cannot do to the RSAM and R/VC>180 figures, the Board in fact already has done. The Board adopted a new RSAM methodology in *Simplified Standards*, which it subsequently applied retroactively to the years 2002 to 2004, even though the Board previously had calculated the RSAM for those years under a different methodology. Compare the decisions served on Dec. 20, 2007 and April 25, 2006 in *Rate Guidelines—Non-Coal Proceedings*, STB Ex Parte No. 347 (Sub-No. 2). What DuPont seeks is much less intrusive because it does not seek to change the RSAM methodology at all. Rather,

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DuPont asks the Board to update its cost-of-capital input to the RSAM methodology, by using the most current and precise cost of capital.

Contrary to CSXT's claims, this would not "disrupt settled expectations and business conduct and commercial decisions made several years ago in reliance on the Board's published RSAM figures." CSXT Reply Ev. at 39. The RSAM figures that DuPont seeks to update were published only three months ago

CSXT's assertion that the Board would have to reopen settled decisions, if it applies the CAPM WACC methodology in this case, is absolutely wrong. CSXT Reply Ev. at 39-40, n 43. Whereas a settled decision is administratively final, this case is not. DuPont asks only that the Board apply its most current and precise standards to determine the reasonableness of CSXT's rates in this pending case. The Board is under no obligation to reopen settled, administratively final decisions that applied the old cost of capital methodology in place at the time those cases were decided. *See United States v Estate of Donnelly*, 397 U S 286, 295-97 (1970) (Harlan, J , *concurring*) (In the civil area, a new decisional rule should not apply retroactively "when the transaction is beyond challenge because...the rights of the parties have been fixed by litigation and have become res judicata "), *quoted in, American Trucking Associations, Inc v Smith*, 496 U S 167, 214-15 (1990) (Stevens, J , *dissenting*) (although dissenting in the result, this was the majority opinion on the issue of retroactivity, *see id* at 201 (Scalia, J *concurring in judgment*))

3. Implementation of CAPM does not constitute an impermissible adjustment to URCS.

CSXT attempts to avoid application of the CAPM WACC methodology by calling it an impermissible adjustment to URCS. CSXT Reply Ev. at 46. But that is not what the Board meant when it declared its intention to use only unadjusted URCS to calculate the variable cost of the issue and comparison group movements. The Board was addressing requests to make

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"movement-specific" adjustments to URCS to substitute the cost of handling a specific movement for the system average cost used by URCS *Simplified Standards* at 84, *See also, Major Issues in Rail Rate Cases*, STB Ex Parte No 657 (Sub-No. 1), slip op at 48 (served Oct 30, 2006) (movement-specific adjustments are "the use of variable cost units different from the URCS system-wide average figure ") The application of CAPM WACC is not a movement-specific adjustment; it is a "technical correction" to an URCS input that is uniformly applied to the calculation of the URCS variable cost for all movements.

4. **DuPont has conservatively understated the effect of applying the CAPM approach.**

CSXT contends that the Board cannot apply the CAPM WACC methodology in this case because multiple other variables and calculations would be affected by a switch to CAPM WACC, for which DuPont has not made any adjustments CSXT Reply Ev at 43-46 These are the recalculation of variable costs for both the issue and comparison traffic, the re-identification of traffic in the Waybill Sample with an R/VC>180, and the re-selection of a comparable group from this revised R/VC>180 traffic As CSXT correctly observes, however, this "would require use of data and information the Board has held inadmissible for purposes of selecting comparison groups " *Id* at 37. For that reason, DuPont did not calculate the impact of the CAPM WACC upon all of these other variables But, by making only the changes that it presented in its Opening and Reply Evidence, DuPont took a conservative approach that produces a higher maximum reasonable rate than a full approach would have produced

Although CSXT correctly notes that the CAPM WACC may cause the R/VC ratios of the comparison groups to increase, *id* at 44, CSXT neglects to mention the countervailing effects of reducing the variable cost of the issue movements and increasing the amount of traffic with an

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R/VC >180. The net effect of these changes inevitably produces a lower maximum reasonable rate than applying just the adjustments that DuPont has made

To demonstrate this fact, DuPont witness Crowley has shown the other effects of switching to the CAPM WACC and how they flow through to determine the maximum reasonable rates for the issue movements Crowley Reb. V S at 20, Ex TDC-27 In the DuPont Opening and Reply Evidence, Mr Crowley only adjusted the CSXT RSAM and R/VC >180 benchmarks by re-costing the 2002-2005 Waybill Sample data to include the CAPM WACC. Now, in order to show the CAPM WACC impact upon the other variables identified by CSXT, Mr Crowley has taken the additional steps of using the CAPM WACC to recalculate the issue movement variable costs and revising the comparison group by applying the DuPont "final offer" selection criteria to the revised universe of R/VC >180 traffic in the Waybill Sample

For the Amptill Movement, the DuPont Reply Evidence, adjusted for the CAPM WACC, produced a maximum R/VC ratio of 305% and a maximum rate of \$4934.93. The restated CAPM WACC procedure produces a higher maximum R/VC ratio of 313% that, when applied to a lower issue movement variable cost, results in a lower maximum rate of \$4836.88 Crowley Reb. V S , Ex TDC-27

For the Duart Movement, the DuPont Reply Evidence, adjusted for the CAPM WACC, produced a maximum R/VC ratio of 308% and a maximum rate of \$4563.67. The restated CAPM WACC procedure produces a higher maximum R/VC ratio of 319% that, when applied to a lower issue movement variable cost, results in a lower maximum rate of \$4518.92. *Id*

For the Washington Movement, the DuPont Reply Evidence, adjusted for the CAPM WACC, produced a maximum R/VC ratio of 308% and a maximum rate of \$4552.73 The restated CAPM WACC procedure produces a higher maximum R/VC ratio of 320% that, when

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applied to a lower issue movement variable cost, results in a lower maximum rate of \$4522 30.

Id

This proves that CSXT's critique of the DuPont application of the CAPM WACC methodology is a red-herring. The additional steps that DuPont did not take, because *Simplified Standards* does not permit them, would produce lower maximum reasonable rates. DuPont is not asking the Board to prescribe those rates, but has introduced this information solely in response to CSXT's charge that DuPont did not take these steps for result-oriented reasons. CSXT Reply Ev at 45, n. 48.

B. DuPont Has Properly Applied An Efficiency Adjustment to the RSAM.

In its Opening Evidence at 31-33, DuPont argued that the Board must apply an "efficiency adjusted" RSAM in order to satisfy its statutory obligation to consider the Long-Cannon factors. The efficiency adjusted RSAM eliminates traffic being carried at less than long-run variable cost. Because there no longer is significant excess capacity in the rail industry, DuPont argued that today, more than ever before, there is no reason for rail carriers to be transporting commodities at less than long-run variable cost.

CSXT contends that the Board should reject an efficiency-adjusted RSAM as an "other relevant factor" because the Board eliminated the RSAM "range" concept in *Simplified Standards* after no party objected to its proposal. CSXT Reply Ev at 49. It is misleading to claim that no party objected to elimination of the efficiency-adjusted RSAM in *Simplified Standards*. The Board in fact proposed a new methodology for calculating the RSAM that was very different from its prior methodology, which had included the RSAM range. *Simplified Standards* (decision served July 28, 2006), pp. 22-24. No party objected to elimination of the RSAM range as to that methodology. However, in the final *Simplified Standards* decision, at pp.

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19-20, the Board decided not to adopt that methodology, but instead adopted an entirely different methodology from any that it, or any commenting party, had proposed. Thus, the Board never offered any party an opportunity to object to elimination of the RSAM range as to the RSAM methodology that it ultimately adopted.

Although the Board recently rejected a petition for reconsideration of the efficiency-adjusted RSAM in *Simplified Standards* (decision served March 19, 2008), the Board did so on procedural, not substantive, grounds. Moreover, the Board noted that the petitioners "ask for something we have already granted. Under the Three-Benchmark method, parties may submit evidence of 'other relevant factors' to demonstrate that the maximum lawful rate should be higher or lower, such as evidence 'that the railroads are not operating as efficiently as possible.' *Simplified Standards* at 22." *Id.*, slip op. at 13. Thus, the Board has not foreclosed the evidence submitted by DuPont that CSXT is carrying traffic at less than long-run variable cost and that such traffic should be excluded from the RSAM benchmark.

C. The Board Should Reject CSXT's RSAM Adjustment.

CSXT has identified an alleged flaw in the Board's RSAM calculation that it attempts to correct. CSXT Op. Ev. at 22-24. Because the RSAM revenue shortfall is calculated after all taxes have been paid, CSXT claims that the revenue needed to make up that shortfall also must be calculated after taxes in order for CSXT to achieve revenue adequacy. There are two fundamental problems with CSXT's adjustment.

First, even if the Board accepts CSXT's contention that there is a flaw, CSXT erroneously applies its statutory tax rate, even though its effective tax rate was much lower in 2002-2005. DuPont Reply Ev. at 28-29. This causes CSXT to grossly overstate the amount of revenue required to pay taxes on the revenue shortfall. Although the proper tax rate to consider is

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CSXT's marginal tax rate, that can only be determined from CSXT's actual tax returns, which CSXT has declined to put into evidence in this proceeding. Therefore, CSXT's effective tax rate is the best and most reliable evidence.

DuPont, however, does not accept CSXT's claim that any adjustment to the RSAM is required, because URCS overstates the tax component of variable costs by using the statutory tax rate. *Id.* at 29-30. This has resulted in URCS including taxes for CSXT that are several times more than CSXT's actual tax expense. This overstates CSXT's variable costs, which reduces the Revenue > 180 amount. Thus, CSXT's revenue shortfall is already overstated.

As this debate has demonstrated, there are a multitude of countervailing factors that must be considered before declaring the existence of a flaw in the RSAM methodology and precisely how to fix such a flaw. Indeed, the Board received several rounds of comments in *Simplified Standards* without anyone identifying this alleged flaw. Therefore, the Board should not determine the existence of a flaw within the narrow confines of this proceeding between just DuPont and CSXT. Rather, the Board should apply the RSAM that it adopted after extensive public notice and comment and direct CSXT to raise the alleged flaw in a petition to reopen *Simplified Standards*.

D. CSXT's "Market" Adjustment Is Neither Necessary Nor Appropriate.

CSXT wrongly attempts to adjust the revenues and costs of every comparison group movement to 2007 "market" levels because the challenged rates were first published in 2007. CSXT Op. Ev. at 25-28. DuPont has objected to CSXT's adjustments as unnecessary and inappropriate on three grounds.

First, CSXT incorrectly assumes that the Board should evaluate rate reasonableness based upon a static period in time, *i.e.*, a specific calendar year. But, from the earliest permutations of the Three-Benchmark approach, the Board has strived to follow a multi-year approach that

PUBLIC VERSION

smooths out market fluctuations over time. Because a rate prescription is for a five year period, it is important to prescribe a rate that is based neither upon the peak nor the trough of the business cycle CSXT's "market" adjustments would undermine the Board's carefully considered decision to use a 4-year average of all three benchmarks in order to smooth out the impact of market fluctuations over time when comparing the R/VC ratios of the issue traffic with a comparison group. DuPont Reply Ev. at 31-34.

Second, CSXT's adjustment methodology is far from objective CSXT has adjusted only the R/VC ratios of the comparison group benchmark, without accounting for the offsetting impact of those adjustments upon the RSAM and R/VC>180 benchmarks *Id* at 34-35 What we are left with are comparison movement R/VC ratios that nominally have been indexed to 2007 price levels, and RSAM and R/VC >180 ratios based on averages of 2002 to 2005 historic rates and costs This apples-to-oranges comparison would allow CSXT to apply much higher R/VC ratios to DuPont than would be proper The Board rejected a similar proposal in *Simplified Standards*, at pp 84-85, and it should do so again in this case.

Third, CSXT has not demonstrated that its adjustment is necessary to reflect changes in the market DuPont Reply Ev at 35-37. CSXT's primary justification for its proposed adjustment is that total revenues for its chemical group as a whole have increased since 2002 CSXT's chemical group, however, covers a broad range of commodities, including sand, plastics, petroleum coke, LPG, soda ash and various TIH commodities, that have nothing in common other than being included in CSXT's chemical business group CSXT has not attempted to attribute its increased revenues to a more narrow group that includes the issue commodities. Neither has CSXT attempted to segregate fuel surcharges from its increased revenue, which is a significant revenue factor that is independent of the chemical transportation market

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In order to show that indexing is not necessary, DuPont Witness Crowley has developed the range and average R/VC ratios of the DuPont "final offer" comparison groups for each year of the Waybill Sample from 2002 to 2005. Crowley Reb. V.S. at 15 and Ex. TDC-25. Although the R/VC ratios cover a wide range, the annual averages fall within a much narrower band. Furthermore, the average R/VC ratios are at least equal, if not higher, in the earlier years than in the later years. This validates the Board's conclusion in *Simplified Standards*, pp. 84-85, that no indexing of revenues or variable costs is necessary, since the R/VC ratios will reflect the annual changes in revenues and variable costs.

V. CALCULATION OF MAXIMUM R/VC RATIOS

DuPont has calculated the maximum R/VC ratio for each issue movement in three ways. First, DuPont has applied the formula in *Simplified Standards* to each of its three "final offer" comparison groups. Second, DuPont has adjusted the result of the Board's formula, as described in its opening evidence, to account for the "Long-Cannon" factors in the statute. 49 U.S.C. 10701(d)(2)(A)-(C). Third, DuPont has recalculated the RSAM and R/VC > 180 benchmarks, as described in its opening evidence, to apply the Board's most current and accurate methodology for calculating the cost of capital. DuPont has summarized these results in the chart below.

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Maximum R/VC Ratios Based Upon DuPont "Final Offer" Comparison Groups			
	Ampthill Movement	Duart Movement	Washington Movement
Maximum R/VC Ratio Based Upon <i>Simplified Standards</i> without "other relevant factors" ¹²	328%	331%	331%
Maximum R/VC Ratio Based Upon RSAM with efficiency adjustment ¹³	308%	311%	311%
Maximum R/VC Ratio Based Upon New Cost of Capital Methodology ¹⁴	305%	308%	308%

VI. CONCLUSION

DuPont respectfully requests the Board to

- (1) find that the CSXT's common carrier rates applicable to the transportation of the commodity between the origins and destinations named in the Complaint are unreasonable,
- (2) prescribe just and reasonable rates for the future applicable to the rail transportation of DuPont's traffic, pursuant to 49 U.S.C §§ 10704(a)(1) and 11701(a), and,
- (3) award DuPont reparations, plus applicable interest, in accordance with 49 U.S.C § 11704 for unlawful rates set by CSXT for the period beginning June 16, 2007 to the effective date of a decision by the Board prescribing just and reasonable rates

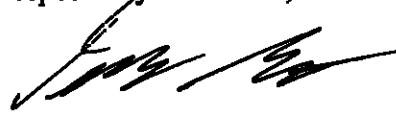
¹² Crowley Reply V S at 29, Table 5

¹³ Crowley Reply V S at 45, Table 6

¹⁴ Crowley Reply V S at 46, Table 7

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Respectfully submitted,

A handwritten signature in black ink, appearing to read "Nicholas J. DiMichael", written over a horizontal line.

Nicholas J. DiMichael

Jeffrey O. Moreno

Karyn A. Booth

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1920 N St. N.W., Suite 800

Washington, D.C. 20036

*Attorneys for E I du Pont de Nemours and
Company*

April 4, 2008

PUBLIC VERSION

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

<hr/>)	
E I DUPONT DE NEMOURS AND COMPANY)	
	Complainant,)	
)	
v)	Docket No NOR 42099
)	
CSX TRANSPORTATION, INC.,)	
)	
	Defendant)	
<hr/>)	

PART II – REBUTTAL VERIFIED STATEMENTS

- 1) Rebuttal Verified Statement of Mary Pileggi, North American Region Logistics Manager, DuPont Logistics, Global Sourcing and Logistics
- 2) Rebuttal Verified Statement of Kevin Acker, U S. Modal Leader for Rail Procurement and Service, DuPont Logistics
- 3) Rebuttal Verified Statement of Amy Nemchik, Logistics Manager, DuPont Glass Laminating Solutions
- 4) Rebuttal Verified Statement of Thomas D Crowley, President, L E Peabody and Associates, Inc , Alexandria, Virginia

PUBLIC VERSION

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

<hr/>)	
E I. DUPONT DE NEMOURS AND COMPANY)	
	Complainant,)	
)	
v)	Docket No 42099
)	
CSX TRANSPORTATION, INC)	
	Defendant)	
<hr/>)	

**REBUTTAL VERIFIED STATEMENT OF MARY PILEGGI
E I DUPONT DE NEMOURS AND COMPANY**

1. My name is Mary Pileggi. I am the U S./Canada Regional Logistics Manager for E I du Pont de Nemours and Company ("DuPont" or the "Company") in Wilmington, DE I am the same Mary Pileggi who submitted a Verified Statement as part of the Opening Evidence filed by DuPont in this proceeding on February 4, 2008 I am submitting this Rebuttal Verified Statement in response to claims made by CSX Transportation, Inc ("CSXT") in its Reply Evidence filed on March 5, 2008.

2 As I discussed in my Opening Verified Statement, a long-term master rail agreement between DuPont and CSXT expired on June 15, 2007 Prior to the expiration of the master rail agreement, CSXT and DuPont engaged in intense rate negotiations in an attempt to establish a new master agreement As part of those negotiations, CSXT first proposed the rates for the Heyden-Duart and Heyden-Washington plasticizer Movements that are at issue in this proceeding on March 9, 2007 Following CSXT's proposal, several of DuPont's business units met with CSXT representatives to discuss the harmful effects CSXT's proposed rates would have on DuPont's business One of the last DuPont business units to meet with CSXT was the

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Packaging and Industrial Polymers business unit The Packaging and Industrial Polymers business unit includes the Glass Laminating Solutions business group, which produces Butacite®, the DuPont product for which plasticizer is a key raw material

3 The meeting between the Packaging and Industrial Polymers/Glass Laminating Solutions business unit and CSXT's representatives took place on June 7, 2007 Only six days later, on June 13, 2007, Steve Schlessinger, a CSXT employee, sent DuPont the final tariff rates that would take effect on June 16, 2007 A copy of Mr Schlessinger's email is attached as Exhibit 4 to DuPont's Rebuttal Evidence The June 13 tariff rates for the Heyden-Duart and Heyden-Washington plasticizer Movements are exactly the same as those originally proposed by CSXT in March, almost three months before the June 7 meeting. These rates are \$5,799 per railcar for the Heyden-Duart Movement and \$5,487 per railcar for the Heyden-Washington Movement As I discussed in my first Verified Statement, DuPont was forced to accept these unreasonable rail rates because of the strong contamination concerns surrounding the movement of plasticizers by truck

4. Additionally, while CSXT speculated in its Reply Evidence that DuPont could save on labor costs by allowing truck drivers to load and unload plasticizer, such a course of action is not a realistic possibility and no one from DuPont ever represented otherwise with respect to the plasticizer Movements. Due to the strong concerns DuPont has regarding contamination, the Company would not depend on truck drivers to unload plasticizer. Rather, as I discussed in my Opening Verified Statement, DuPont employs specially trained operators to unload the plasticizer shipments.

5 CSXT also raises the possibility of inventory cost savings in its Reply Evidence. In point of fact, if the contamination concerns surrounding the movement of plasticizers by truck

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did not exist and DuPont were free to ship by truck, any inventory cost savings DuPont could enjoy would be minimal at best. DuPont only orders single railcars of plasticizer on an "as needed" basis to avoid having large amounts of plasticizer sitting unused in inventory. For this reason, the amounts kept on hand are relatively small and are used quickly.

6. If the contamination concerns DuPont faces regarding plasticizer were not present, any marginal operational cost savings from reduced plasticizer inventories would be more than offset by the higher labor costs stemming from the need to hire additional skilled operators for truck unloading at the Duart and Washington Works facilities. Thus, in the end, the lower inventory costs that could result from truck shipments would not significantly impact my cost analysis.

7. I was also surprised by CSXT's claims that DuPont has competitive transloading alternatives for the issue movements. The nearest transload facilities for the issue movements would be on Norfolk Southern (NS) [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

8. The nearest NS transload facilities for the two plasticizer movements from Heyden, NJ are located at Columbus, Ohio for the Washington Works, WV destination and Charlotte, NC for the Duart, NC destination. The NS tariff rates for the rail portion of these theoretical transload movements through Columbus and Charlotte are attached to the DuPont

¹ All shaded text contains CONFIDENTIAL and HIGHLY CONFIDENTIAL information that is subject to a protective order in this proceeding.

PUBLIC VERSION

Rebuttal Evidence as Exhibits 5 and 6 The tariff rates for NS are \$10,520 per car from Heyden to Columbus and \$10,070 per car from Heyden to Charlotte

9. The nearest NS transload facility for the synthetic plastics movement from Amthill, VA to Wyandotte, MI is at Petersburg, VA. The NS tariff rate for the rail portion of this theoretical transload movement is attached to our Rebuttal Evidence as Exhibit 9. The tariff rate for NS is \$9,326 per car.

10 The synthetic plastic powder that is the subject of the Amthill-to-Wyandotte Movement at issue in this proceeding is a grade of a DuPont-trademarked product called Zytel DuPont only produces Zytel at two facilities in the United States—the facility at Amthill, VA, and the Washington, WV plant However, all of the Zytel that DuPont produces at its Washington Works facility remains on-site for the Company's own use in the manufacture of other products

11. [REDACTED]

[REDACTED]

[REDACTED] With respect to the Amthill-Wyandotte Movement, in addition to contamination and motor carrier cost concerns, the DuPont customer's expressed preference to receive shipments by rail also prevents DuPont from seriously considering carriage by truck unless the emergency or expedited nature of an order leaves no other alternative

VERIFICATION

STATE OF DELAWARE)
)
CITY OF WILMINGTON)

I, Mary Pileggi, verify under penalty of perjury that I have read the foregoing Rebuttal
Verified Statement of Mary Pileggi, that I know the contents thereof, and that the same are true
and correct Further, I certify that I am qualified and authorized to file this statement

Executed on April 3, 2008



Mary Pileggi

REBUTTAL
VERIFIED STATEMENT
OF KEVIN ACKER

REDACTED

PUBLIC VERSION

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

E I DUPONT DE NEMOURS AND COMPANY

Complainant,

v.

CSX TRANSPORTATION, INC.

Defendant.

Docket No 42099

**REBUTTAL VERIFIED STATEMENT OF AMY NEMCHIK
E I DUPONT DE NEMOURS AND COMPANY**

1. My name is Amy Bonnett Nemchik I am the Logistics Manager for E I du Pont de Nemours and Company's ("DuPont" or the "Company") Glass Laminating Solutions business group, which falls under DuPont's Packaging and Industrial Polymers business unit I am submitting this Rebuttal Verified Statement in response to claims made by CSX Transportation, Inc ("CSXT") in its Reply Evidence filed on March 5, 2008.

2

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

¹ All shaded text contains CONFIDENTIAL and HIGHLY CONFIDENTIAL information that is subject to a protective order in this proceeding

PUBLIC VERSION

3. Because I was unaware of the impact of contamination concerns associated with the plasticizer, my truck cost calculations were incorporated into the PowerPoint presentation made by DuPont's Performance and Industrial Polymers business unit on June 7 [REDACTED]

[REDACTED]

[REDACTED]


4 I first learned about the contamination concerns associated with the plasticizer through my discussions with the Butacite® Area Manager, who has many years of experience and is knowledgeable of the quality impact on final product application. Based on these discussions, I concluded that the overriding risk of contamination and the cost impact to the business meant that it would not be feasible for DuPont to switch to motor carriage of the plasticizer for the Heyden-to-Washington Works movement.

VERIFICATION

STATE OF DELAWARE)
)
CITY OF WILMINGTON)

I, Amy Bonnett Nemchik, verify under penalty of perjury that I have read the foregoing
Rebuttal Verified Statement of Amy Nemchik, that I know the contents thereof, and that the
same are true and correct. Further, I certify that I am qualified and authorized to file this
statement.

Executed on April 3, 2008


Amy Bonnett Nemchik

Elizabeth A Baker
Notary for the state of
Delaware - county of New Castle

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

E. I. duPont de Nemours and Company)

Complainant)

v)

CSX Transportation, Inc.)

Defendant)

Docket No. NOR 42099

Rebuttal
Verified Statement

of

Thomas D. Crowley
President
L. L. Peabody & Associates, Inc.

Due Date: April 4, 2008

PUBLIC VERSION

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LIST OF EXHIBITS

<u>EXHIBIT NO.</u>	<u>DESCRIPTION</u>
TDC -21	Comparison of DuPont and CSX1 Reply Evidence "Final Offer" Comparable Groups for the Amphill Movement
TDC -22	Comparison of DuPont and CSXT Reply Evidence "Final Offer" Comparable Groups for the Duart Movement
TDC -23	Comparison of DuPont and CSX1 Reply Evidence "Final Offer" Comparable Groups for the Washington Movement
TDC -24	Impact of Rounding of Issue Traffic Miles on DuPont's Non-Hazardous Comparable Groups and Maximum R/VC Ratio
TDC -25	Comparison of DuPont's Reply Comparable Group R/VC Ratio Range and Average by Year -Non-Hazardous
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TDC -27	Comparison of Application of CAPM Cost of Capital in DuPont's Reply to CSXT's Suggested Application Methodology - Non-Hazardous

I. INTRODUCTION

My name is Thomas D. Crowley. I am the same Thomas D. Crowley who filed verified statements in this proceeding on February 4, 2008 ("Opening VS") and March 5, 2008 ("Reply VS") on behalf of E. I. duPont de Nemours and Company ("DuPont"). My qualifications and experience are attached to my Opening VS as Exhibit 1 ("TDC-1").

DuPont is requesting that the Surface Transportation Board ("STB") prescribe reasonable rates, service terms and reparations associated with the transportation of non-hazardous commodities via CSX Transportation, Inc. ("CSX") for the following three (3) movements:

1. Plastic powder from Amthill, VA to Wyandotte, MI ("Amthill Movement").
2. Plasticizers from Heyden, NJ to Duart, NC ("Duart Movement") and
3. Plasticizers from Heyden, NJ to Washington, WV ("Washington Movement").

In my Opening VS, I applied the STB's procedures for the Three-Benchmark Methodology specified in the STB's September 5, 2007 decision in Ex Parte No. 646 (Sub-No. 1) Simplified Standards for Rail Rate Cases ("Simplified Standards") and provided the following information in support of DuPont's request:

1. The revenue / variable cost ("R/VC") ratio for each of the issue movements.
2. The selection of comparable CSX movements from the STB's Unmasked Confidential Waybill Sample ("Waybill Sample") for CSX for each year 2002 through 2005.
3. The upper boundary of the R/VC ratio for the comparable group (referred to as the "Maximum R/VC Ratio") for each of the issue movements following the STB's procedures specified in Simplified Standards.

- 4 The identification and quantification of other relevant factors, and
- 5 The relief to which DuPont is entitled for each issue movement

Simultaneous with the filing of DuPont's Opening evidence on February 4, 2008, CSXT filed its Opening evidence in this proceeding. In my Reply VS, I critiqued and responded to CSXT's Opening evidence and incorporated revisions to the analyses included in my Opening VS. My Reply VS included the "Final Offer" comparable groups for each issue movement.¹

Simultaneous with the filing of DuPont's Reply evidence on March 5, 2008, CSXT filed its Reply evidence in this proceeding with its "Final Offer" comparable groups for each of the issue movements.

In my Rebuttal verified statement ("Rebuttal VS"), I respond to CSXT's Reply evidence criticisms of my Opening VS, and provide a critique of CSXT's Reply evidence analyses and results. My Rebuttal VS is summarized under the following headings:

- II Variable Costs and R/VC Ratios for the Issue Movements
- III Comparable Group Selection
- IV Other Relevant Factors
- V Relief for DuPont

¹ See Reply VS, Exhibit 1 (IDC-16), Exhibit 2 (IDC-17) and Exhibit 3 (IDC-18).

**II. VARIABLE COSTS AND R/VC
RATIOS FOR THE ISSUE MOVEMENTS**

As discussed in my Reply VS at pages 3 through 7, CSXI and DuPont agreed on the rates for the issue movements but disagreed on the variable costs. I identified one difference between DuPont's and CSXI's Opening evidence calculation of variable costs and explained why CSXI was incorrect.

In its Reply evidence, CSXI did not address differences in the parties' variable cost calculations. The correct variable costs and R/VC ratios for the issue movements are shown in Tables 3 and 4, respectively, in my Reply VS.

III. COMPARABLE GROUP SELECTION

The SIB's decision in Simplified Standards specified the procedures to develop the Maximum RVC Ratio for the issue movements using the Three Benchmark Methodology. The primary component of the specified procedures is the selection of the comparable group for the issue movement as it forms the basis for all subsequent calculations. Each party selects its initial comparable group for the issue movement and submits it in simultaneous opening evidence filings. After reviewing the other party's opening evidence, each party has the option to make modifications to its initial comparable group but is restricted to the universe of movements submitted in opening, i.e. the combination of movements submitted by both parties. On Reply, each party must submit its "final offer" comparable group for the issue movement without the benefit of evaluating criticisms from the other party. On Rebuttal, each party may critique the other party's "final offer" comparable group.

In my Opening VS, I presented three comparable groups, i.e. one for each issue movement. In my Reply VS I critiqued CSXI's two comparable groups.² I also modified my three comparable groups based on CSXI's Opening evidence. In its Reply, CSXT critiqued my opening comparable groups and revised its opening comparable groups by adopting some of DuPont's selection criteria and developing a separate comparable group for each issue movement. My review of CSXI's Reply evidence and my discussion of the remaining differences in the comparable movement selection criteria are summarized below under the following topics:

² CSXT developed a comparable group for the Amphill Movement and a comparable group that it used for both the DuPont and Washington Movement.

A Comparison of Comparable Groups

B Differences in Selection Criteria

**A. COMPARISON OF
COMPARABLE GROUPS**

In my Opening VS I included three separate comparable groups, one for each issue movement. In its Opening evidence CSXT included two comparable groups. In my Reply VS at pages 10 through 30 I compared the respective initial comparable groups and developed the “final offer” comparable groups for each issue movement. In CSXT’s Reply evidence at pages 12 through 34, CSXT addressed the differences between the parties’ initial comparable groups, agreed that a separate comparable group was needed for each issue movement and developed its “final offer” comparable groups for the issue movements. In this Rebuttal, I have developed a comparison of CSXT’s “final offer” comparable groups to each of the three “final offer” comparable groups from my Reply VS.

Exhibit_(IDC-21) compares my Reply comparable group for the Amphill Movement to the Reply comparable group presented by CSXT. Exhibit_(IDC-21) is broken into two sections. The first section lists the movements in my Reply VS comparable group (“DuPont Section”). These movements are color-coded to identify whether or not they were included in CSXT’s comparable group. Movements shaded in blue were included in CSXT’s Reply comparable group. Movements shaded in yellow were not included in CSXT’s Reply comparable group. For the yellow-shaded movements, I identified the following two reasons as to why that particular movement was not included in CSXT’s comparable group based on CSXT’s Reply description of its selection criteria:

1. The STCC was other than 28211, and/or

- 2 The miscellaneous charges were zero

The applicable reason(s) for exclusion from CSXI's Reply comparable group is/are identified by numbers 1 and 2 (corresponding to the above two reasons) which were placed to the left of each yellow-shaded movement on Exhibit_(TDC-21)

The second section of Exhibit_(TDC-21) lists the movements in CSXT's Reply comparable group and compares them to the comparable group I submitted in Reply for the Amphill Movement (CSXT Section). CSXI's movements are color-coded to identify whether or not they were included in my Reply comparable group. Movements shaded in blue were included in my Reply comparable group - Movements shaded in green were not included in my Reply comparable group. For the green-shaded movements, I identified that the only reason why that particular movement was not included in my Reply comparable group was that the miles for the movement fell outside the mileage range specified in my selection criteria, i.e., outside +/- 150 miles of the miles for the issue movement rounded to the nearest 50-mile increment.

Exhibit_(TDC-22) contains the same comparisons for the DuPont Movement. However, because both DuPont and CSXT included movements with NJCC's listed in CSXI Tariff 28033, the reasons for CSXI's exclusion of DuPont comparable movements (in the DuPont Section) are slightly different as shown below:

- 1 The miscellaneous charges were zero and/or
- 2 The movement was classified by CSXI as an issue movement

- These are the same movements shaded in blue in the DuPont Section of Exhibit_(TDC-21)

The reason in the CSXT Section is the same, i.e., the movement fell outside DuPont's mileage range

Exhibit_11DC-23) contains the same comparisons for the Washington Movement with the reasons identical to those for the Duart Movement. My discussion of the reasons for the differences between CSXT's Reply comparable groups and my Reply comparable groups for each issue movement is contained in the following section

**B. DIFFERENCES IN
SELECTION CRITERIA**

In my Opening VS, at pages 8 through 10, I explained how I selected the comparable movements from the SIB's Waybill Samples for 2002 through 2005 to develop comparable groups for each of the three issue movements. At pages 14 through 22 of its Opening filing, CSXT explained how it selected the comparable group that it applied to the Amphill Movement (plastic powder) and the comparable group it applied to the Duart and Washington Movements (plasticizers). At pages 12 through 23 of my Reply VS, I critiqued the differences between the respective parties' Opening comparable groups. At pages 12 through 34 of its Reply evidence, CSXT did the same.

The comparison of the Reply comparable groups submitted by DuPont and CSXT discussed above identified only four remaining differences in selection criteria. My discussion of these differences is contained under the following headings:

1. Comparable STCC's
2. Miscellaneous Charges
3. Issue Movements

4 Length of Haul

5 Summary

1. Comparable STCC's

In my Reply VS at pages 13 through 14 I agreed with CSXT that the comparable groups for the Duart and Washington Movements should be limited to the STCC's listed in CSXT Tariff 28003. Therefore, there is no dispute on comparable STCC's for these two issue movements.

However, in my Reply VS at page 14, I disagreed with CSXT's restriction of comparable movements for the Amthill Movement to the 5-digit STCC level of 28211. As CSXT used the listing of STCC's in CSXT Tariff 28003 for the Duart and Washington Movements, with which I agreed, I believe that the same approach should be used for the Amthill Movement. Therefore, I used the STCC's listed in the applicable tariff, CSXT Tariff 28211.

In its Reply evidence CSXI did not explain why the tariff listing of STCC's was sufficient for the Duart and Washington Movements but not for the Amthill Movement.

2. Miscellaneous Charges

At page 28 of its Reply CSXI claims it "appropriately limited its comparison groups to only those movements for which CSXT applied a fuel surcharge" while DuPont did not apply this limitation. CSXI uses the Miscellaneous Charges field in the Waybill Sample as the identifier as to whether or not a movement was assessed a fuel surcharge.

This fuel surcharge issue was addressed at pages 14 through 16 of my Reply VS and CSXT raises no new arguments in its Reply

First, CSXT provided no evidence of a link between fuel surcharges and miscellaneous charges reported in the Waybill Sample. The Waybill Sample User Guide provided by the STB along with the Waybill Sample defines Miscellaneous Charges as "The total of all miscellaneous charges, excluding transit and freight revenue charges, shown in dollars." The definition clearly encompasses more than fuel surcharge revenues.

Second, CSXT did not provide any evidence that it reports fuel charges separately in the miscellaneous charges field of the Waybill Sample or that fuel surcharges are the only monies reported in the miscellaneous charges field.

Lastly, CSXT attempted to justify its exclusion of movements with no miscellaneous charges, which CSXT equates to fuel surcharges, by stating that fuel prices have nearly tripled from January 2002 to January 2008 and more than doubled from January 2002 to December 2005, the time period covered by the Waybill Sample.¹ CSXT gives the impression that it was not compensated for increasing fuel prices if there was no fuel surcharge shown for a movement. Even assuming that the miscellaneous charges did reflect fuel surcharges, the lack of miscellaneous charges does not mean that CSXT was not compensated for increasing fuel prices.

Exhibit (IDC-13) to my Reply VS contained a comparison of the increase in the EIA U.S. No. 2 Diesel fuel price cited by CSXT and the fuel component of the Rail Cost Adjustment Factor

¹ See footnote 19 on page 18 of CSXT's Opening evidence.

(RCAF) used to adjust rates for rail traffic. As shown in Reply Exhibit (TDC-13), the fuel component of the RCAF increased at a faster rate than EIA's U.S. No. 2 Diesel price. Specifically, the fuel component of the RCAF nearly quadrupled from 1Q02 to 1Q08 and more than tripled from 1Q02 to 4Q05. Even if there was no separate fuel charge, the rate adjustment mechanism, e.g., the RCAF, was capturing the increase in CSX's fuel prices.

For the above reasons, CSX's exclusion of comparable movements simply on the basis of zero miscellaneous charges is improper.

3. Issue Movements

Although not discussed in CSX's Reply evidence, there is a difference between the parties on the methodology used to exclude issue movements from the comparable groups for the Duarte and Washington Movements. Specifically, CSX excluded movements between Heyden and Washington from the Heyden to Duarte comparable group and excluded movements between Heyden and Duarte from the Heyden to Washington comparable group.

As discussed in my Reply VS. at pages 12 through 13, I excluded the issue movements from the comparable groups separately for each issue movement. Stated differently, in my final comparable group for the Duarte Movement included in Reply, I excluded all Heyden to Duarte movements from the comparable group but included any movements between Heyden and Washington as this movement is not an issue movement for purposes of the Duarte Movement. I excluded the issue movements for the Washington Movement in the same manner.

CSX's methodology for excluding issue movements is improper.

4. Length of Haul

In my Opening VS at page 9 I explained that one of my selection criteria for comparable movements was loaded miles within a range of plus or minus 150 miles of the issue movement loaded miles rounded to the nearest 50 miles. This resulted in mileage ranges of 600 to 900 miles for the Amphill Movement, 450-750 miles for the Duart Movement and 450-750 miles for the Washington Movement. In my Reply VS I continued to rely on these mile ranges when selecting my "final offer" comparable groups for each issue movement.

In Opening, CSXT's selection criteria was much broader, i.e., CSXT included movements in the comparable group with mileages as low as 209 miles and as high as 1,740 miles for the Amphill Movement and 1,454 miles for the Duart and Washington Movements. CSXT's broad mileage ranges were critiqued at pages 20 through 22 of my Reply VS.

In Reply, CSXT accepted the mileage range of plus or minus 150 miles but applied it incorrectly. CSXT attempts to justify its misapplication by claiming that DuPont committed two errors in its mileage selection. First, CSXT takes issue with the rounding of the issue movement miles to the nearest 50-mile increment prior to the application of the plus or minus 150 mile range. Second, CSXT disagrees with the issue movement miles used by DuPont. As explained below, neither of these differences are errors.

DuPont's rounding of the issue miles to the nearest 50-mile increment was the criteria selected to identify comparable movements in the Waybill Sample. There was no intention to identify more shorter or more longer movements as CSXT seems to infer in its discussion at pages 31 through 32 of its Reply evidence.

To test the impact of DuPont's 50-mile rounding criteria, I used the universe of comparable movements selected by each party in Opening and applied the selection criteria I used in Reply for the selection of the final offer comparable groups changing only the mileage range to plus or minus 150 miles of the issue movement miles as calculated by DuPont. The result, shown in Exhibit_(TDC-24), is that the rounding of the issue miles has very little impact on the comparable group and the resulting Maximum R/VC Ratio. Specifically, for the Amphill Movement, the number of comparable movements decreases from 361 to 335 and the Maximum R/VC Ratio increases from 328% to 333%. For the Duart Movement, the number of comparable movements decreases from 154 to 151 and the Maximum R/VC Ratio increases from 331% to 332%. For the Washington Movement, the number of comparable movements decreases from 148 to 145 and the Maximum R/VC Ratio increases from 331% to 332%. Stated differently, the impact of rounding the issue movement miles has virtually no impact on the comparable groups and the Maximum R/VC Ratios.

CSXT's disagreement with DuPont's issue movement miles used to determine the starting point for the mileage range has no merit. As I explained at pages 5 through 6 of my Reply VS. CSXT, improperly relied on miles from internal data prohibited by the SIB. DuPont properly relied on miles obtained from the same source used to develop the miles for the movements in the Waybill Sample.

5. Summary

CSX1 has improperly and unreasonably narrowed the comparable group for the Amphill Movement by restricting the movements to the 5-digit STCC of 28211 rather than the STCC's listed in CSX1 Tariff 28211. For the Duart and Washington Movements, CSX1 has improperly excluded comparable movements under the guise of issue movements. CSX1 has also improperly and unreasonably narrowed the comparable groups for all three issue movements by including only those movements with miscellaneous charges greater than zero. Finally, CSX1 has improperly applied the mileage range to all three issue movements by relying on miles developed using information that the SFB has prohibited from these proceedings.

DuPont's comparable groups should be accepted by the SFB.

IV. OTHER RELEVANT FACTORS

In this section of my Rebuttal VS, I respond to CSXT's Reply evidence pertaining to the other relevant factors included by CSXT. Then, I respond to CSXT's Reply evidence criticism of DuPont's other relevant factors. These discussions are contained below under the following headings:

A. CSXT's Other Relevant Factors

B. DuPont's Other Relevant Factors

A. CSXT'S OTHER RELEVANT FACTORS

My discussion of CSXT's other relevant factors addresses the two factors developed by CSXT in its evidence, i.e. (1) an adjustment to RSAM Ratio and (2) indexing of Waybill Sample variable costs and revenues.

1. Adjustment to RSAM Ratio

In my Reply VS at pages 31 through 36, I explained why CSXT's adjustment to the RSAM Ratio for an alleged failure to include taxes was improper and erroneous. In its Reply evidence, at pages 36 through 37, CSXT refers to this correction as simply a "technical correction" and claims that it is different from the "organic change to the RSAM proposed by DuPont." CSXT offers no support for its contention that the STB erred in Simplified Standards. CSXT's adjustment should be rejected by the STB.

**2. Indexing of Waybill Sample
Variable Costs and Revenues**

In my Reply VS at pages 36 through 43, I explained why CSXI's indexing of Waybill Sample variable costs and revenues was improper, unsupported and unnecessary.

In its Reply, at pages 35 through 36, CSXI continues to assert that the 2002 to 2005 revenue and variable cost data for the comparable group from the Waybill Sample provides an inconsistent comparison for evaluating the R/VC ratios of the challenged rates and must be indexed to 2007.

To demonstrate that indexing is not required, I developed the range and average R/VC ratios for the comparable movements included in DuPont's "final offer" comparable groups included in my Reply VS. The results of this analysis are shown on Exhibit_(IDC-25).

Exhibit_(IDC-25) shows that the R/VC ratios for the comparable movements over the four-year period of 2002-2005 cover a wide range each year but the annual averages are within a much narrower band. Exhibit_(IDC-25) also shows that the R/VC ratios are higher in the earlier years. This supports the STB's position at pages 84-85 of Simplified Standards that no indexing of revenues or variable costs is necessary as the R/VC ratios will reflect the annual changes in revenues and variable costs. Applying CSXI's indexing methodology to the revenues and variable costs will artificially increase the R/VC ratios of the comparable movements as shown by the high R/VC ratios presented in CSXI's evidence.

**B. DUPONT'S OTHER
RELEVANT FACTORS**

In my Opening VS I included two other relevant factors and quantified their application on the calculation of the Maximum R/V/C Ratio for the issue movements. In my Reply VS, I performed the same analyses applied to the "final offer" comparable groups for each issue movement. In its Reply, CSXT criticized the two other relevant factors presented in my testimony. CSXT's criticisms and my responses are discussed under the following topics:

1. STB's RSAM Ratio Adjusted for Efficiency
2. STB's RSAM and R/V/C₁₀₀ Ratios Adjusted for the STB's New Cost of Capital Methodology

**1. STB's RSAM Ratio
Adjusted for Efficiency**

At pages 11-12 of my Opening VS I described the methodology I used to adjust the STB's RSAM for efficiency. I used that same methodology in my Reply VS.

In its Reply at pages 47 through 49 CSXT claimed that DuPont's RSAM ratio adjusted for efficiency should be rejected by the STB. The "Long-Cannon" factors address the amount of traffic transported by a railroad (a) at revenues that do not cover costs and (b) at revenues that contribute only marginally to fixed cost. Simplified Standards allows a party to introduce evidence on other relevant factors including that the defendant railroad is not operating as efficiently as it could. My efficiency adjustment addresses these Long Cannon concerns.

My adjustment to the RSAM ratio by excluding movements with a R/VC ratio less than 1.0 satisfies both of these objectives. First, it eliminates the inefficiency of CSX I handling traffic that does not cover its cost or contributes only marginally to fixed costs. Second, it satisfies the other relevant factors component of Simplified Standards as I have quantified the impact on the calculation of the maximum R/VC ratios for the issue movements.

**2. STB's RSAM and R/VC¹⁸⁰
Ratios Adjusted for the STB's
New Cost of Capital Methodology**

At pages 13-15 of my Opening VS, I described the methodology I used to incorporate the STB's January 17, 2008 decision in Ex Parte No. 664 Methodology to be Employed in Determining the Railroad Industry's Cost of Capital ("Cost of Capital") to replace its single-stage Discounted Cash Flow ("DCF") model with a Capital Asset Pricing Model ("CAPM") to determine the cost of equity component in the cost of capital calculation. I used that same methodology in my Reply VS.

In its Reply, at pages 37 through 47, CSXT put forth several reasons why DuPont's adjustment should not be accepted by the STB. Before I discuss the reasons why I believe CSXT's position should be rejected, I will summarize the return on equity implicit in the line-haul rates that CSXT's evidence suggests should be charged to move the issue traffic. Table 1 below compares the return on equity included in the 2005 CAPM WACC to the return on equity included in the rate levels suggested by CSXT's evidence on pre-tax and after-tax bases.

Table I Comparison Of Return On Equity Calculate By STB To Return On Equity <u>Implicit In The Rate Levels Suggested By CSXT</u>		
<u>Item</u> (1)	<u>Return On Equity</u>	
	<u>After-Tax</u> (2)	<u>Pre-Tax</u> (3)
1 SIB 2005 CAPM WACC	8.4%	12.9%
2 Amphill Movement	106.8%	151.6%
3 Duart Movement	95.3%	135.3%
4 Washington Movement	97.2%	137.9%

Source: Exhibit 1 (DC-26)

Table I demonstrates that the return on equity implicit in the rate levels suggested by CSX's evidence are many multiples greater than the SIB 2005 CAPM WACC return on equity.

I will now address CSXT's critique of DuPont's cost of capital other relevant factor.

First, CSX states that the SIB does not, and should not, retroactively apply methodology changes and cites several proceedings in support of its position. CSXT is ignoring one very important consideration, i.e., the RSAM calculation is based on a multi-year average. It would be improper and incorrect to adjust the calculation for the CAPM cost of capital in one year and then average it with other years where the adjustment is not made.

Second, CSX claims that this proceeding is not the proper forum for a "far-reaching" retroactive change. CSXT states that the current RSAM methodology was developed as a

product of multiple agency proceedings over several years. CSXT's objection is a double standard. The incorporation of the change to the cost of capital, which the STB has approved, is nothing more than a 'technical correction', to use CSXT's terminology. The STB has the data and programs in place to substitute the CAPM cost of capital into its URCS program to develop revised URCS formulas for the 2002-2005 time period and then apply the revised URCS formulas to the movements in the Waybill Sample to develop the variable costs for each movement. Once this has been completed, the selection process and Maximum R/VC Ratio calculations follow the procedures outline in Simplified Standards.

Third, CSXT claims that adjusting for the CAPM cost of capital would add complexity, cost and delay to these proceedings. This is only partially true. There has been some degree of complexity and cost added because DuPont, rather than the STB, has made the calculations to substitute the CAPM cost of capital into the URCS and Waybill Sample process. However, this complexity and cost will disappear in future proceedings once the STB performs these calculations and distributes the revised URCS and Waybill Sample to the parties to these types of disputes. As for delay, CSXT is misguided because the schedule for the instant proceeding has not been modified for this issue.

Fourth, CSXT claims that DuPont failed to make other necessary adjustments to fully reflect the impact of the CAPM cost of capital. Specifically, DuPont did not re-cost the comparable group movements or the issue movements using the CAPM cost of capital. CSXT goes on to say that the comparable group should be re-selected based on the revised R/VC ratios that would result from the revised variable costs using the CAPM cost of capital.

CSX is correct that DuPont did not re-cost the comparable group movements or the issue movements and did not re-select the comparable group as these adjustments are prohibited by Simplified Standards. Specifically, the impact of other relevant factors must be quantified after the comparable group has been selected from the Waybill Sample provided from the STB. That is why DuPont adjusted only the R/VC adjustment ratio applicable to the comparable group movements for the application of the CAPM cost of capital.

However, all of the adjustments identified by CSX can be made and I have done so in this Rebuttal in order to demonstrate that DuPont's methodology provided conservative results. Exhibit 1 (DC-27) displays the results of my analysis. The variable cost, maximum R/VC ratio and maximum rate for each of the issue movements based on my Reply VS application of the CAPM cost of capital adjustment are shown in Columns (2) through (4), respectively. Columns (5) through (7) show the results after making the adjustments suggested by CSX including re-selecting the comparable movements. As CSX surmised, the maximum R/VC ratio is higher for all three movements. However, the application of the higher maximum R/VC ratio to the lower issue movement variable costs results in lower maximum rates than shown in my Reply VS. Based on this analysis, DuPont's methodology for the CAPM costs of capital adjustment is conservative.

In summary, DuPont's modification for CAPM cost of capital is a technical correction should be made retroactively and can be implemented by the STB with minimal effort even reflecting all the adjustments suggested by CSX.

V. RELIEF FOR DUPONT

As shown in Table 8 of my Reply VS, DuPont is entitled to relief totaling \$1.15 million using the STB's RSAM and R/VC'_{180} ratios subject to the appropriate cap in Three-Benchmark cases. The relief increases to \$1.49 million using the RSAM and R/VC'_{180} ratios adjusted for efficiency and to \$1.54 million using the RSAM and R/VC'_{180} ratios adjusted only for the CAPM cost of capital (i.e., unadjusted for efficiency) again subject to the appropriate cap.

REDACTED

REDACTED

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REDACTED


REDACTED

REDACTED

VERIFICATION

COMMONWEALTH OF VIRGINIA)
)
CITY OF ALEXANDRIA)

I, THOMAS D CROWLEY, verify under penalty of perjury that I have read the foregoing Verified Statement of Thomas D Crowley that I know the contents thereof, and that the same are true and correct. Further, I certify that I am qualified and authorized to file this statement.


Thomas D Crowley

Sworn to and subscribed
before me this 3^d day of April, 2008

Ad. - 37. n. n. n.

Diane R. Kavounis
Notary Public for the State of Virginia

My Commission expires November 30, 2012

PUBLIC VERSION

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

E.I DUPONT DE NEMOURS AND COMPANY)

Complainant,)

v)

CSX TRANSPORTATION, INC ,)

Defendant)

Docket No NOR 42099

PART III – REBUTTAL EXHIBITS

EXHIBIT 1

REDACTED

-

EXHIBIT 2

REDACTED


EXHIBIT 3

REDACTED

EXHIBIT 4

REDACTED

Exhibit 5



For assistance
1-800-235-5551 or echelp@nscorp.com

User: John D Amoroso Logons 150

Access: Internet - GZip Compressed Terms/Privacy

Merchandise Rate List

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Search Criteria: **Origin:** **Destination:** **STCC:** 2818967
 COVINGTON, OH Tank car

Show All Conditions | Hide All Conditions

Expand	Price	Min	Per	Authority	Type	Car Type	Car Owner	Route	Eff Date	Ex
<input checked="" type="checkbox"/>	944977-0000		CAR	NSRQ-64455	Public	Tank car	ALL	NS LOCAL ONLY	2007-12-18	20X
+ G556 - PRICES IN THIS AUTHORITY ARE NOT SUBJECT TO FUEL SURCHARGE + 0076 - RATES APPLY ONLY IN TANK CARS + 0687 - SUBJECT TO RULE 35 OF UFC EXCEPT FOR MIN WT PROVISIONS + 2738 - RECIPROCAL SWITCHING IF ANY WILL BE ABSORBED AT ORIGIN & DES + 4913 - NS TARIFF 6004-SERIES COVERING DEMURRAGE WILL APPLY + 4964 - MILEAGE ALLOW ON PRIVATE CARS WILL BE PAID IN FULL + 6900 - RATES NOT APPLICABLE TO NS STATIONS FSAC 60000-69999										
<input checked="" type="checkbox"/>	944977-0000		CAR	NSRQ-64455	Public	Tank car	ALL	NS LOCAL ONLY	2007-12-18	20X

Fuel Surcharge: Fuel surcharges may vary significantly between railroads. Be sure to consider fuel surcharge levels when comparing these with those on other carrier's websites.

Exhibit 6



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Merchandise Rate List

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Search Criteria: **Origin:** **Destination:** **STCC:** **Car Type:**
 HAYDEN, NJ CHARLOTTE, NC 2818967 Tank car

Show All Conditions Hide All Conditions		Price	Per	Min Wt	Authority	Type	Car Type	Car Owner	Route	Eff Date	Ex
Expand		\$1070.0000	CAR		NSRQ-64455	Public	Tank car	ALL	NS LOCAL ONLY	2007-12-18	200
+ G556 - PRICES IN THIS AUTHORITY ARE NOT SUBJECT TO FUEL SURCHARGE + 0076 - RATES APPLY ONLY IN TANK CARS + 0887 - SUBJECT TO RULE 35 OF UFC EXCEPT FOR MIN WT PROVISIONS + 2739 - RECIPROCAL SWITCHING IF ANY WILL BE ABSORBED AT ORIGIN & DES + 4913 - NS TARIFF 6004-SERIES COVERING DEMURRAGE WILL APPLY + 4984 - MILEAGE ALLOW ON PRIVATE CARS WILL BE PAID IN FULL - 6900 - RATES NOT APPLICABLE TO NS STATIONS FSAC 60000-69999 RATING RULES RATES WILL NOT APPLY TO NS STATIONS FSAC 60000 THROUGH 69999											
+		\$44627.0000	CAR		NSRQ-64455	Public	Tank car	ALL	NS LOCAL ONLY	2007-12-18	200

Fuel Surcharge: Fuel surcharges may vary significantly between railroads. Be sure to consider fuel surcharge levels when comparing this with those on other carrier's websites.

EXHIBIT 7

REDACTED

EXHIBIT 8

REDACTED

EXHIBIT 9

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Search Criteria: **Origin:** PETERSBURG, VA **STCC:** 2821163
Destination: WYANDOTTE, MI **Car Type:** Covered hopper

[Show All Conditions](#) | [Hide All Conditions](#)

Expand	Price	Per	Min Wt	Authority	Type	Car Type	Car Owner	F
-	\$9326 0000	CAR		NSRQ-64802	Public	Covered hopper	P	NE
+ G556 - PRICES IN THIS AUTHORITY ARE NOT SUBJECT TO FUEL SURCHARGE + M221 - RATES NOT APPLICABLE FROM OR TO NS STATIONS FSAC 60000-69999 + 2739 - RECIPROCAL SWITCHING IF ANY WILL BE ABSORBED AT ORIGIN & DES + 3990 - RATES APPLY ONLY FOR SHIPPER OWNED/LEASED COVERED HOPPERS + 4913 - NS TARIFF 6004-SERIES COVERING DEMURRAGE WILL APPLY + 4964 - MILEAGE ALLOW ON PRIVATE CARS WILL BE PAID IN FULL + 5592 - RATE APPLIES WHEN MAX LADING DOES NOT EXCEED 200,000 LBS + 6793 - FROM NIAGARA FALLS APPLY BUFFALO RATE BASE NUMBER								
-	\$10015 0000	CAR		NSRQ-64802	Public	Covered hopper	P	NE
+ G556 - PRICES IN THIS AUTHORITY ARE NOT SUBJECT TO FUEL SURCHARGE + M221 - RATES NOT APPLICABLE FROM OR TO NS STATIONS FSAC 60000-69999 + 2739 - RECIPROCAL SWITCHING IF ANY WILL BE ABSORBED AT ORIGIN & DES + 3990 - RATES APPLY ONLY FOR SHIPPER OWNED/LEASED COVERED HOPPERS + 4913 - NS TARIFF 6004-SERIES COVERING DEMURRAGE WILL APPLY + 4964 - MILEAGE ALLOW ON PRIVATE CARS WILL BE PAID IN FULL + 6188 - MAXIMUM WEIGHT 220000 LBS RATE APPLIES ONLY WHEN THE MAXIMU + 6793 - FROM NIAGARA FALLS APPLY BUFFALO RATE BASE NUMBER								
-	\$10655 0000	CAR		NSRQ-64802	Public	Covered hopper	P	NE
+ G556 - PRICES IN THIS AUTHORITY ARE NOT SUBJECT TO FUEL SURCHARGE + M222 - RATES APPLICABLE ONLY FROM OR TO NS STATIONS FSAC 60000-69999 + 2739 - RECIPROCAL SWITCHING IF ANY WILL BE ABSORBED AT ORIGIN & DES + 3990 - RATES APPLY ONLY FOR SHIPPER OWNED/LEASED COVERED HOPPERS + 4913 - NS TARIFF 6004-SERIES COVERING DEMURRAGE WILL APPLY + 4964 - MILEAGE ALLOW ON PRIVATE CARS WILL BE PAID IN FULL + 5592 - RATE APPLIES WHEN MAX LADING DOES NOT EXCEED 200,000 LBS + 6793 - FROM NIAGARA FALLS APPLY BUFFALO RATE BASE NUMBER								
-	\$11342 0000	CAR		NSRQ-64802	Public	Covered hopper	P	NE
+ G556 - PRICES IN THIS AUTHORITY ARE NOT SUBJECT TO FUEL SURCHARGE + M222 - RATES APPLICABLE ONLY FROM OR TO NS STATIONS FSAC 60000-69999 + 2739 - RECIPROCAL SWITCHING IF ANY WILL BE ABSORBED AT ORIGIN & DES								

CERTIFICATE OF SERVICE

I hereby certify that I have on this 4th day of April 2008, served a copy of the foregoing Complainant's Rebuttal Evidence on Paul Moates and Paul Hemmersbaugh, Sidley and Austin, 1501 K Street, NW, Washington, D C. 20005, via hand delivery and email

A handwritten signature in black ink, appearing to read 'Jeffrey O. Morcno', is written over a horizontal line.

Jeffrey O Morcno